Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HARVARD LAW SCHOOL
LIBRARY

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO

FROM AUGUST 24, 1895, TO DECEMBER 19, 1896.

CHARLES H. GILDERSLEEVE
REPORTER

VOLUME VIII

COLUMBIA, MO.:
E. W. STEPHENS, PUBLISHER,
1897.

Entered according to act of Congress in the year 1897 by

E. W. STEPHENS,

In the office of the Librarian of Congress at Washington, D. C.

Rec. Jan. 23, 1901.

JUDGES AND OFFICERS

OF THE

SUPREME AND DISTRICT COURTS

OF THE

TERRITORY OF NEW MEXICO.

FROM 1846 TO 1896, BOTH INCLUSIVE.

COMPILED BY

JAMES H. PURDY

OF THE SANTA FE BAR.

CHIEF JUSTICES.

By the organic act, 1851, the supreme court was constituted of a chief justice and two associate justices. In 1887 a third associate justice was added; and in 1889 was added a fourth associate justice.

	APPOINTED.
Joab Houghton. . . . . by Gen. S. W. Kearney. Died January 31, 1876.	1846
Grafton Baker.	1851
J. J. Davenport	1853
Kirby Benedict. . . . . Died at Santa Fe, New Mexico, 1875.	1858
John P. Slough . . . . . Died at Santa Fe, New Mexico, December 17, 1867.	1866
John S. Watts . . . . . Died in Indiana, in 1873.	1868
Joseph G. Palen. . . . . Died at Santa Fe, New Mexico, December, 1875.	1869
Henry L. Waldo. . . . . Resigned.	1876
Chas. McCandless. . . . . Resigned.	1878
L. Bradford Prince.	1879
Samuel B. Axtell. . . . . Died at Morristown, New Jersey, 1893.	1882
William A. Vincent.	1885
Elisha V. Long	1885
James O'Brien.	1889
Thomas Smith.	1893

JUDGES OF THE FIRST DISTRICT.

Headquarters at Santa Fe.

The First District, from 1846 to 1860, included the counties of Santa Fe, Santa Ana, and San Miguel. In 1860, the counties of Mora, Colfax, Taos, and Rio Arriba, were added. In 1887, the First District was made to include the counties of Santa Fe, San Juan, Rio Arriba, and Taos.

	APPOINTED.
*Joab Houghton. . . . . from New Mexico.	1846
*Grafton Baker.	1851
*J. J. Davenport.	1853
*Kirby Benedict. . . . . from Illinois.	1858
*John P. Slough. . . . . from Colorado.	1866
*John S. Watts.	1868
*Joseph G. Palen . . . . . from New York.	1869
*Henry L. Waldo. . . . . from New Mexico.	1876
*Chas. McCandless. . . . . from Pennsylvania.	1878
*L. Bradford Prince . . . . . from New York.	1879
*Samuel B. Axtell . . . . . from California.	1882
**Reuben A. Reeves. . . . . from Texas	1887
**Wm. H. Whiteman. . . . . from New Mexico.	1889
**Edward P. Seeds. . . . . from Iowa.	1890
**Napoleon B. Laughlin. . . . . from New Mexico.	1894

---

* Chief Justice.
** Associate Justice.

ASSOCIATE JUSTICES, SECOND DISTRICT.

Headquarters at Albuquerque.

The Second District, from 1846 to 1860, was composed of the counties of Bernalillo, Valencia, and (soon as organized) Socorro, Dona Ana, and Arizona. In 1860, the District was constituted of the counties of Bernalillo, Valencia, and Socorro. In 1889, Socorro county was transferred to the Fifth District.

	APPOINTED.
Antonio J. Otero from New Mexico.	1846
John S. Watts from Indiana. Died, 1873.	1851
Perry E. Brocchus from Maryland. Died.	1857
W. F. Boon	1859
Sydney A. Hubbell from New Mexico. Died at Las Vegas, 1880.	1861
Perry E. Brocchus from Maryland. Died at Baltimore.	1867
Hezekiah S. Johnson from New Mexico. Died at Albuquerque, 1873.	1870
John I. Reddick from Nebraska.	1876
Samuel B. McLin from Florida. Died in Florida.	1877
Samuel C. Parks. from Illinois.	1878
Joseph Bell from New York. Died in California, 1887.	1882
William H. Brinker from Missouri.	1885
William D. Lee from New Mexico.	1889
Needham C. Collier from Georgia.	1893

ASSOCIATE JUSTICES, THIRD DISTRICT.

Headquarters at Taos, 1846–1860.

The Third District, from 1846 to 1860, consisted of the counties of Taos and Rio Arriba. In 1860, those counties became part of the First District, organized of Dona Ana county. In 1887, the Third District was reorganized of Dona Ana and Grant counties, with headquarters at Las Cruces. In 189–, Sierra county was added, and in 1895, Silver City was designated as headquarters.

	APPOINTED.
Chas. Beaubien from New Mexico. Died at Taos, New Mexico, January, 1846.	1846
Horace Mower	1851
Kirby Benedict from Illinois. Died at Santa Fe, New Mexico.	1853
Wm. G. Blackwood from South Carolina. Died in New Mexico.	1858
Joseph G. Knapp	1861
Joab Houghton from New Mexico. Died January 31, 1876.	1865
Abraham Berger from Minnesota.	1869
Benjamin J. Waters from Missouri.	1870
Daniel B. Johnson from Minnesota.	1871
Warren Bristol from Minnesota. Died, Deming, New Mexico.	1872
Stephen F. Wilson from Pennsylvania.	1884
Wm. F. Henderson from Arkansas. Died, Washington, D. C., 1890.	1885
John R. McFie from New Mexico.	1889
Albert B. Fall from New Mexico. Resigned.	1893
Gideon D. Bantz. from New Mexico.	1895

ASSOCIATE JUSTICES, FOURTH DISTRICT.

Headquarters at Las Vegas.

This District was organized in 1887, of the counties of San Miguel, Colfax, Mora, and Lincoln. In 1889, Lincoln county became part of the Fifth District, and, in 1891, Guadalupe county was added, and, in 1893, Union county.

	APPOINTED.
Elisha V. Long	1889
James O'Brien. a from Minnesota.	1890
Thomas Smith from Virginia.	1893

ASSOCIATE JUSTICES, FIFTH DISTRICT.

Headquarters at Socorro.

This District was organized in 1889, of the counties of Socorro, Lincoln, with Chavez and Eddy counties when organized.

	APPOINTED.
Alfred A. Freeman from Washington, D. C.	1890
Humphrey B. Hamilton from New Mexico.	1895

CLERKS OF THE SUPREME COURT.

Appointed by the Court.

	APPOINTED.
James M. Giddings. of Missouri. Died, Fort Sumner, 189–.	1852
Louis D. Sheets of Missouri.	1854
Augustine de Marle Died, Santa Fe, New Mexico.	1856
Samuel Ellison. of Kentucky. Died, Santa Fe, July 20, 1889.	1859
Wm. M. Gwynne of Ohio.	1866
Peter Connelly of New Mexico.	1867
Samuel Ellison of Kentucky. Died, Santa Fe, 1889.	1868
William Breeden of Kentucky.	1869
Marshall A. Breeden of Kentucky.	1872
Rufus J. Palen of New York.	1873
John H. Thompson of Missouri.	1877
Frank W. Clancy of New Hampshire.	1880
Charles M. Phillips of New Jersey.	1883
Ruel M. Johnson of Indiana.	1886
Robert M. Foree of Kentucky.	1887
Summers Burkhart of West Virginia.	1889
Harry S. Clancy of New Hampshire.	1891
Page B. Otero of New Mexico.	1893
George L. Wyllys of Virginia.	1894

UNITED STATES ATTORNEYS.

	APPOINTED.
Frank P. Blair, Jr. from Missouri.	1846
Hugh N. Smith from New Mexico.	1847
Elias P. West	1851
Wm. H. H. Davis from Pennsylvania.	1853
Wm. Claude Jones	1855
Richard H. Tompkins from New Mexico.	1858
Theodore D. Wheaton from New Mexico.	1860
Merrill Ashurst from Alabama.	1861
Stephen B. Elkins from New Mexico.	1867
S. M. Ashenfelter from Pennsylvania.	1871
Thos. B. Catron from New Mexico.	1872
Sidney M. Barnes from Arkansas.	1878
George W. Prichard from New Mexico.	1883
Joseph Bell from New Mexico.	1884
Thomas Smith from Virginia.	1885
Eugene A. Fiske from New Mexico.	1889
J. B. H. Hemingway from New Mexico.	1893

ATTORNEYS-GENERAL.

Appointed by the Governor, and confirmed by the Legislative Assembly.

	APPOINTED.
Hugh N. Smith..... of Missouri.	1846
Elias P. West.....	1848
Henry C. Johnson... ..... of Pennsylvania.	1852
Merrill Ashurst.. ..... of Alabama. Died, Santa Fe, 1869.	1852
Theodore D. Wheaton.... ... of Missouri. Died, Ocate, New Mexico, 1876.	1854
Richard H. Tompkins..... of Kentucky. Died.	1858
Hugh N. Smith..... . ... of Missouri. Died, Santa Fe.	1859
Spruce M. Baird..... ... . of Texas. Died at Cimarron, New Mexico, 1873.	1860
Richard H. Tompkins..... of Kentucky. Died at Santa Fe, 1888.	1860
Charles P. Cleaver... . .... of Germany.	1862
Stephen B. Elkins..... ..... of Missouri.	1866
Charles P. Cleaver..... of Germany. Died May 30, 1874.	1867
Merrill Ashurst..... ..... of Alabama.	1867
Thomas B. Catron..... of Missouri.	1869
Thomas F. Conway..... of Missouri.	1872
Wm. Breeden..... ..... of Kentucky.	1873
Henry C. Waldo.. ..... of Missouri.	1878
Wm. Breeden.... ..... of Kentucky.	1878
Edward L. Bartlett . ..... of Kansas. Solicitor General.	1889
John P. Victory .... of New York. Solicitor General.	1895

UNITED STATES MARSHALS.

	APPOINTED.
Richard Dallum	1846
John G. Jones.....	1851
Charles L. Rumley.....	1853
Charles H. Merritt..... ...	1854
Charles Blumner.... .. .... from New Mexico. Died, Santa Fe, 1872.	1856
Charles P. Cleaver. ..... from New Mexico. Died, Tome, New Mexico, 1874.	1858
Abram Cutler..... ..... from Kansas.	1861
John Pratt..... from Kansas.	1866
John Sherman, Jr .... from Ohio. Died, Washington, D. C.	1876
A. L. Morrison..... from Illinois.	1881
Romulo Martinez..... .... from New Mexico.	1885
Trinidad Romero..... from New Mexico.	1889
Edward L. Hall. ..... from New Mexico.	1893

LIST OF ATTORNEYS

Practicing in the Supreme Court of New Mexico between 1846 and 1896.

Adams, B. F.
Allen, Samuel T.
Ashurst, Merrill
Atkinson, H. M.
Axtell, S. B.
Bail, John D.
Bantz, Gideon D.
Barber, Geo. B.
Barnes, Sidney M.
Barnes, R. P.
Barr, A. J.
Bartlett, Edward L.
Bateman, A. S.
Bell, Chas. G.
Bell, John J.
Bell, Joseph
Berger, Wm. M.
Bonham, Joseph F.
Bowman, W. C.
Breeden, Marshall A.
Breeden, William
Bristol, Warren
Bryan, D. J.
Bryan, R. W. D.
Bunker, W. B.
Burkhart, Summers
Burns, Harrison
Catron, Thomas B.
Caypless, Edgar
Chaves, J. Francisco
Childers, W. B.
Clancy, Frank W.
Clarke, Fred W.
Collier, N. C.
Conway, Thomas F.
Crane, William F.
Crist, J. H.
Davis, Wm. W. H.
Dobson, E. W.
Dougherty, H. M.
Douglass, Thomas G.
Downs, Francis
Dunne, Edmund F.
Eaton, W. J.
Elliott, A. B.
Emmett, LaFayette.
Fall, A. B.
Fergusson, H. B.
Field, Neill B.
Fielder, Idus L.
Fielder, James S.
Finical, Thos. A.
Fiske, Eugene A.
Fitch, J. G.
Fort, L. C.
Fountain, A. J.
Fox, George W.
Frazer, John R.
Freeman, A. A.
Frost, Max.
Gary, Joseph E.
Gildersleeve, Chas. H.
Gillett, S. B.
Goodwin, Jesse C.
Graves, Wm. C.
Green, T. A.
Gwin, John M.
Hamilton, H. B.
Harllee, A. H.
Hazledine, Wm. C.
Heacock, W. C.
Heflin, Thos. N.
Hemingway, J. B. H.
Hewitt, J. Y.
Houghton, Joab
Hoyt, Abram G.
Hubbell, Sydney A
Jackson, C. L.
Johnson, Henry C.
Johnston, Geo. W.
Jones, A. A.
Kelly, W. E.
Knaebel, G. W.
Knaebel, John H.
Koogler, John H.
Larrazolo, O. A.
Laughlin, N. B.
Leahey, J.
Lee, Wm. D.
Lemon, George
Leonard, Ira E.
Lester, Felix H.
Loesch, F. J.
Long, E. V.
Masterson, Murat
McComas, Chas. C.
McComas, H. L.
McFie, John R.
McMillen, A. B.
Medler, E. L.
Mills, Melvin W.
Money, Geo. P.
Morrison, A. L.
Newcomb, S. B.
O'Bryan, J. D.
Ortiz, M. C.
Pope, William H.
Parker, F. W.
Pickett, H. L.
Pierce, W. L.
Pilliams, Palmer J.
Posey, G. Gordon
Preston, George C.
Price, Edward V.
Prichard, George W.
Prince, L. Bradford
Purdy, James H.
Quinn, James H.
Read, Benj. M.
Read, A.
Read, L. G.
Reynolds, James R.
Riley, Chilion
Risque, John B.
Ritch, Wm. G.
Rodey, Bernard.
Russell, D. C.
Rynerson, Wm. L.
Salazar, Miguel
Sena, Jose D.
Shaw, James M.
Shield, David P.
Skinner, Wm. C.
Sloan, Andrew
Sloan, Wm. B.
Smith, Hugh N.
Smith, Thomas
Sniffen, John S.
Spiess, Chas. A.
Springer, Frank
Stearns, DeWitt C.
Stevens, Benjamin
Stone, W. S.
Sulzbacher, Louis
Sutherlin, J. H.
Terrill, Wm. C.
Thompson, F. A.
Thornton, Wm. T.
Tiffany, I. S.
Tompkins, Richard H.
Trimble, L. S.
Tuley, Murray F.
Twitchell, R. E.
Van der Veer, P. L.
Veeder, John D. W.
Victory, John P.
Vincent, Wm. A.
Wade, E. C.
Waitman, Hanson
Waldo, Henry L.
Warner, Milton J.
Warren, Henry L.
Watson, W.
West, Elias B.
Wheaton, Theodore
Whiteman, Wm. H.
Wilkerson, Thos. N.
Woodward, Jesse B.
Wright, F. J.
Yeaman, Caldwell
Young, J. Morris
Young, R. L.

TABLE OF CASES REPORTED.

NO.		PAGE
661	Aguilar v. Territory	496
574	Albright v. Texas, S. F. & N. R. Co.	110
574	Albright v. Texas, S. F. & N. R. Co.	422
604	Baca v. Perez	187
591	Barrett, Territory v.	70
579	Bent v. Miranda	78
623	Biena, United States v.	99
700	Borrego et al., In re	655
618	Borrego v. Territory	446
628	Brunswick, Janes v.	105
628	Brunswick, Janes v.	345
612	Cable Co., Trust Co. v.	327
606	Carmichael, Eberle v.	169
606	Carmichael, Eberle v.	696
384	Carmody, Territory v	376
637	Catron, In re	253
617	Catron, Stanton v	355
611	Cattle Co., Coon v	123
685	Chamberlain, Territory v	538
671	Chavez, Territory v.	528
611	Coon v. Cattle Co	123
629	Crossan, Gentile v.	347
658	Curran v. Kendall B. & S. Co	417
624	De Gutman, Territory v.	92
606	Eberle v. Carmichael	169
606	Eberle v. Carmichael	696
615	Etheridge, Insurance Co. v	18
584	First Nat. Bank v. Lee	589
609	Folsom, Saint v	650
573	Folsom, United States v	651
554	Ford v. Land Ass'n	37
620	Friday, Territory v	204
629	Gentile v. Crossan	347
632	Griego, Territory v	133
655	Holmes v. Tyler	613
645	Hughes, In re	225
700	In re Borrego et al.	655
637	In re Catron	253
645	In re Hughes	225
650	In re Jaramillo	598
634	In re Peraltareavis	27
619	In re Spitz Bros	622
615	Insurance Co. v. Etheridge	18
628	Janes v. Brunswick	105
628	Janes v. Brunswick	345
650	Jaramillo, In re	598
658	Kendall B. & S. Co., Curran v.	417
651	Laird v. Upton	409
554	Land Ass'n, Ford v.	37
625	Leary, Territory v	180
584	Lee, First Nat. Bank v	589
682	Lermo, Territory v.	566
666	Lockhart, Territory v.	523
616	Lockhart v. Woollacott	21
635	Lucero, Territory v	543
613	Madden, Trust Co. v	159
653	Maxwell v. Tufts	396
652	Meyer, Sandoval v	636
579	Miranda, Bent v	78

622 Ortiz, Territory v. ... 154
621 Ortiz, Territory v. ... 220
540 Pacific Gold Co. v. Skillicorn ... 8
649 Padilla v. Territory ... 562
681 Padilla, Territory v. ... 510
634 Peraltareavis, In re ... 27
604 Perez, Baca v. ... 187
663 Renner, Willey v. ... 641
656 Richards, Rogers v. ... 658
656 Rogers v. Richards ... 658
631 Routledge, United States v. ... 385
609 Saint v. Folsom ... 650
595 Salazar v. Territory ... 1
652 Sandoval v. Meyer ... 636
662 Sandoval v. Territory ... 573
540 Skillicorn, Pacific Gold Co. v. ... 8
566 Smith, Strauss v. ... 391
677 Spencer, United States v. ... 667
619 Spitz Bros., In re ... 622
617 Stanton v. Catron ... 355
566 Strauss v. Smith ... 391
660 Swan, United States v. ... 401
661 Territory, Aguilar v. ... 496
591 Territory v. Barrett ... 70
618 Territory, Borrego v. ... 446
384 Territory v. Carmody ... 376
685 Territory v. Chamberlain ... 538
671 Territory v. Chavez ... 528
624 Territory v. De Gutman ... 92
620 Territory v. Friday ... 204
632 Territory v. Griego ... 133
625 Territory v. Leary ... 180
682 Territory v. Lermo ... 566
666 Territory v. Lockhart ... 523
635 Territory v. Lucero ... 543
622 Territory v. Ortiz ... 154
621 Territory v. Ortiz ... 220
681 Territory v. Padilla ... 510
649 Territory, Padilla v. ... 562
595 Territory, Salazar v. ... 1
662 Territory, Sandoval v. ... 573
670 Territory, Trust Co. v. ... 673
627 Territory v. Vialpando ... 211
630 Territory v. Vigil ... 583
574 Texas, S. F. & N. R. Co., Albright v. ... 110
574 Texas, S. F. & N. R. Co., Albtight v. ... 422
612 Trust Co. v. Cable Co. ... 327
613 Trust Co. v. Madden ... 159
670 Trust Co. v. Territory ... 673
653 Tufts, Maxwell v. ... 396
655 Tyler, Holmes v. ... 613
651 Upton, Laird v. ... 409
623 United States v. Biena ... 99
573 United States v. Folsom ... 651
631 United States v. Routledge ... 385
677 United States v. Spencer ... 667
660 United States v. Swan ... 401
627 Vialpando, Territory v. ... 211
630 Vigil, Territory v. ... 583
663 Willey v. Renner ... 641
616 Woollacott, Lockhart v ... 21

CASES APPROVED, FOLLOWED, OVERRULED, AND DISTINGUISHED.

PAGE

Albright v. Texas, S. F. & N. R. Co., 8 N. M. 110. Overruled in part... 422
Archeibeque v. Miera, 1 N. M. 160. Followed..... 105
Baca v. Perez, 8 N. M. 187. Followed..... 204
Bent v. Maxwell, 3 N. M. 227. Distinguished..... 89
Bent v. Miranda, 8 N. M. 78. Followed 92
Coleman v. Bell, 4 N. M. (Gil.) 21. Followed 105, 564
De Cordova v. Korte, 7 N. M. 678. Followed..... 350
Field v. Romero & Co., 7 N. M. 630. Followed..... 350
Finane v. Hotel Co., 3 N. M. (Gil.) 417. Overruled in part..... 48
Kidder v. Bennett, 2 N. M. 37. Approved..... 462
Laird v. Upton, 8 N. M. 409. Followed. 661
Lamy v. Remuson, 2 N. M. 245. Followed..... 102
Leonardo v. Territory, 1 N. M. 291. Followed.....475, 564, 661
Minor v. Marshall, 6 N. M. 195. Followed 52
New Mexico & S. P. R. Co. v. Madden, 7 N. M. 215. Followed..... 168
Pacific Gold Co. v. Skillicorn, 8 N. M. 8. Approved..... 550
Padilla v. Territory, 8 N. M. 562. Followed..... 661
Ruhe v. Abren, 1 N. M. 247. Followed..... 102
Schofield v. Folsom, 7 N. M. 601. Followed..... 650
Secou v. Leroux, 1 N. M. 390. Approved..... 490
Sierra Co. v. Dona Ana Co. Approved 565
Spiegelberg v. Mink, 1 N. M. 308. Approved 565, 661
Territory v. Abetia, 1 N. M. 546. Followed..... 74
Territory v. Aguilar, 8 N. M. 496. Followed 514
Territory v. Anderson, 4 N. M. (Gil.) 213. Followed.....74, 542, 664
Territory v. Baker, 4 N. M. (Gil.) 236. Followed.....74, 564
Territory v. Barrett, 8 N. M. 70. Approved..... 570
Territory v. Fewel, 5 N. M. 34. Followed..... 580
Territory v. Friday, 8 N. M. 204. Followed. 220, 503, 514, 542, 583
Territory v. Hicks, 6 N. M. 596. Followed..... 501
Territory v. Kelly, 2 N. M. 300. Followed 183
Territory v. Lucero, 8 N. M. 543. Followed..... 503
Territory v. Nichols, 3 N. M. (Gil.) 103. Approved..... 208
Territory v. O'Donnell, 4 N. M. (Gil.) 196. Followed.....414, 519, 564
Territory v. Pridemore, 4 N. M. (Gil.) 275. Followed 579
Territory v. Remuson, 3 N. M. (Gil.) 648. Overruled in part..... 526
Territory v. Romero, 2 N. M. 474. Followed..... 105
Territory v. Romine, 2 N. M. 114. Followed 139, 208, 211, 506
Territory v. Salazar, 8 N. M. 1. Approved 406
Territory v. Trujillo, 7 N. M. 43. Followed 96, 519
Territory v. Webb, 2 N. M. 154. Followed 96, 105
Territory v. Yarberry, 2 N. M. 391. Followed 102, 564
Territory v. Young, 2 N. M. 93. Approved. 208
United States v. De Amador, 6 N. M. 173. Followed..... 519
Waldo v. Beckwith, 1 N. M. 103. Approved 490

CASES CITED.

PAGE

Adams v. State, 29 Ohio St. 12 209
Adler v. State, 25 Ark. 517 461
Agletree v. State, 28 Ala. 693 557
Ahlman v. Meyer, 19 Neb. 63 395
Aiken v. Steiner, 98 Ala. 355 633
Allen v. Delano, 55 Me. 113 400
Allen v. Rowe, 23 Pac. Rep. 901 52
Allen v. State, 54 Ind. 461 158
Alpers v. Scannell, 7 Colo. 590 565
Altman v. Reams, 9 Neb. 487 395
Anderson v. Mather, 38 Barb. 473 87
Anon, 2 Atk. 469. 238
Archiebeque v. Miera, 1 N. M. 160 105
Atkinson v. Ritchie, 10 East, 530 407

Babcock v. Railroad, 9 Metc. (Mass.) 555 691
Baker v. Preston, 1 Gilmer, 285 7
Balch v. Shaw, 7 Cush. 284. 491
Baldwin v. Merrick, 1 Mo. App. 281 48
Ball v. United States, 140 U. S. 136 ..... 471, 486
Bank v. Murdock, 62 Mo. 74 14
Bank v. Railroad, 11 Wall. 624 631
Bank v. Raynor, 61 Cal. 145 167
Barnard v. McKensie, 4 Colo. 251 48
Barnes v. Thompson, 2 Swan (Tenn.) 313 48
Barrett v. State, 36 Me. 198. 460
Bean v. Edge, 84 N. Y. 510 400
Beebe v. Knapp, 16 Mich. 54 531
Beebe v. Russell, 17 How. 283 85
Belden v. Seymour, 8 Conn. 18 63
Benedict v. State, 44 Ohio St. 679 493
Bent v. Railway, 3 N. M. (Gil.) 227 ..... 80, 89
Bilansky v. State, 3 Minn. 427 493
Bishop of Ossary's Case, 3 Crook 534 463
Board v. Dunn, 27 Gratt. 622 7
Bonnie v. Earll, 12 Mont. 240 16
Book v. Mining Co., 58 Fed. Rep. 119 701
Boutell v. Warne, 62 Mo. 350 395
Boyle v. State, 105 Ind. 469 479
Braithwaite v. Cameron, 38 Pac. Rep. (Okla.) 1084. 203
Brazier v. State, 44 Ala. 387 158
Brennan v. People, 15 Ill. 511 15
Brinkerhoff v. Brown, 4 Johns. ch. 675 365
Bronson's Case, 12 Johns. 460 238
Brotherton v. State, 17 S. W. Rep. 932 384
Brown v. Fox, 2 Yeates (Pa.) 531 395
Brown v. Pierce, 7 Wall. 207 375
Brown v. State, 16 Ind. 496 158
Bruce v. United States, 17 How. 437 7
Buckmaster v. Smith, 22 Vt. 203 400
Burns v. Nottingham, 60 Ill. 531 647
Burns v. People, 59 Barb. 532 528
Bybee v. Railroad, 139 U. S. 679 686

Calloway v. Nifong, 1 Mo. 223 461
Canal Co. v. Gordon, 6 Wall. 561..... 48
Cancemi v. People, 18 N. Y. 128..... 157
Camden v. Doremus, 3 How. 533..... 427
Carroll v. State, 24 S. W. Rep. (Tex.) 100..... 483
Cass v. State, 2 Green, 353. 183
Chadsay v. Harrison, 11 Ill. 151..... 647
Chaffee v. United States, 18 Wall. 516..... 557
Chandler v. McCord, 38 Me. 564..... 63
Chambers v. Harrington, 111 U. S. 350... 174
Chew's Appeal, 44 Pa. St. 247..... 604
Chicago v. Gage, 95 Ill. 593. 6
Chicago v. Hoyt, 149 U. S. 1..... 407
Chicago v. Smith, 48 Ill. 610 16
Clark v. Courtney, 5 Pet. 354..... 353
Clark v. Haywood, 51 Vt. 14..... 400
Clarkson v. De Peyster, 3 Paige, 320..... 367
Clinton v. Englebrecht, 13 Wall. 415.. ..... 195, 199
Clune v. United States, 159 U. S..... 478
Cochran v. Van Surlay, 20 Wend. 376..... 87
Coffin v. United States, 156 U. S. 432..... 506, 557
Coleman v. Bell, 4 N. M. (Gil.) 21..... 105, 564
Comm. v. Barker, 12 Cush. 186..... 471
Comm. v. Bugbee, 4 Gray, 206..... 470
Comm. v. Doherty, 10 Cush. 52..... 471
Comm. v. Drum, 58 Pa. St. 9..... 506
Comm. v. Hawkins, 3 Gray, 463.. 560
Comm. v. McCarthy, 152 Mass. 577..... 526
Comm. v. Sturtevant, 117 Mass. 133..... 520
Comm. v. Webster, 5 Cush. 317 571
Comm. v. Wilson, 1 Gray, 337..... 521
Comm. v. York, 9 Metc. (Mass.) 93..... 553
Conrad v. Insurance Co., 1 Pet. 386..... 375, 399
Cook, Petitioner, 15 Pick. 239 460
Cooper v. People, 22 Pac. Rep. 790. 242
Cowell v. Springs Co., 100 U. S. 55..... 339
Craddock v. Turner, 6 Leigh, ——..... 7
Craighead v. Turner, 8 How. 201 84
Crim v. Kessing, 89 Cal. 478..... 491
Cross v. Burke, 146 U. S. 82 656
Curtis v. Cochran, 50 N. H. 244 534
Dains v. State, 2 Humph. 439..... 506
Dale v. Smith, 1 Del. ch. 1. 63
Dassett v. United States, 41 Pac. Rep. 608..... 571
Davis v. Auxiliary Co., 9 S. C. 204..... 60
Davis v. Schwartz, 155 U. S. 631..... 350
Davis v. Smith, 15 Mo. 468..... 407
Davis v. State, 35 Ind. 496..... 672
Davis v. United States, 160 U. S. 469..... 506, 557
De Arguello v. Greer, 26 Cal. 616..... 62
De Cordova v. Korte, 7 N. M. 678..... 350
Deery v. Cray, 5 Wall. 807 140
De Gutman v. Territory, 8 N. M. 92..... 536
Dennison v. State, 13 Ind. 510..... 555
Disct. Columbia v. Armes, 107 U. S. 519..... 520
Disque v. State, 49 N. J. Law, 249..... 479
Dob v. Halsey, 16 Johns. 34, 40 645
Dodge v. Sav. & Trust Co., 106 U. S..... 66
Doe v. Porter, 3 Ark. 57..... 63
Dowling's Case, 13 Miss. 664..... 158
Dows v. Harner, 6 Ohio, 518..... 461

Edwards' Lessee v. Danby, 12 Wheat. 210 195
Edwards v. Harben, 1 Term Rep. 587 399
Ellison v. Lindford, 25 Pac. Rep. 744 202
Ely v. Railroad, 129 U. S. 291 355
Ephland v. Railway, 57 Mo. 147 532
Etting v. Bank, 11 Wheat. 75 140
Everett v. Hall, 67 Me. 497 399
Ewing v. Burnett, 11 Pet. 41 353
Ex parte Barry, 25 Pac. Rep. 62 247
Ex parte Coy, 127 U. S. 731 32
Ex parte Crouch, 112 U. S. 178 31
Ex parte Fow Tong, 108 U. S. 556 657
Ex parte Grace, 12 Iowa, 208 606
Ex parte Harlan, 27 Pac. Rep. 920 33
Ex parte Hopkins, 104 Ind. 157 633
Ex parte Moore, 63 N. 397 239
Ex parte Parks, 93 U. S. 18 32
Ex parte Siebold, 100 U. S. 371 30
Ex parte Virginia, 100 U. S. 339 31
Ex parte Wilkins, 5 Pet. 193 32
Express v. Hutchins, 58 Ill. 44 16

Fairchild v. Snyder, 43 Iowa, 23 671
Farnsworth v. Montana, 129 U. S. 104 657
Fellows v. Griffin, 9 Sm. & M. 362 461
Field v. Romero & Co., 7 N. M. 630 350
Field v. Taylor, 4 Ves. Jr. 396 631
Finane v. Hotel Co., 3 N. M. 417 48
Fletcher v. Peck, 6 Cranch, 128 196
Fogg v. Blair, 133 U. S. 534 439
Forgay v. Conrad, 6 How. 201 83
Freel v. State, 21 Ark. 226 494
Freleigh v. State, 8 Mo. 607 185
Frink v. Ryan, 3 Scam. 322 647
Fritz v. Palmer, 132 U. S. 282 339
Frost v. Spitley, 121 U. S. 552 369

Gabrielsky v. State, 13 Tex. App. 437 527
Gallaher v. State, 17 Fla. 379 663
Galland v. Galland, 44 Cal. 475 611
Gibson v. State, 44 Ala. 23 527
Gilman v. Williams, 7 Wis. 329 629
Gilmer v. Higley, 110 U. S. 47 140
Gilmore v. Gilmore, 40 Me. 50 603
Gore v. McBrayer, 18 Cal. 583 ..... 698, 702
Gottlieb v. Hartman, 3 Colo. 59 13
Graham v. Railroad, 102 U. S. 148 436
Graves v. People, 32 Pac. Rep. 63 571
Grayson v. Lynch, 163 U. S. 468 ..... 484, 565
Green v. Chandler, 54 Cal. 626 60
Green Co. v. Wilhite, 35 Mo. App. 43 662
Gulliher v. People, 82 Ill. 146 17
Guptil v. McFee, 9 Kan. 30 632

Habanin v. Reeding, 3 Mont. 13 177
Hally v. Hampton, 160 Pa. St. 18 633
Ham v. State, 36 Tex. 523 506
Hardin v. State, 4 Tex. App. 371 469
Harkness v. Russell, 118 U. S. 663 400

Harrington v. Latta, 36 N. W. Rep. 364 565
Harrington v. Miller, 4 Wash. 808 52
Harris v. Harris, 39 N. H. 48 647
Hatch v. Garza, 22 Tex. 177 63
Hartung v. People, 22 N. Y. 95 139
Hauser v. State, 33 Wis. 678 32
Hawkins v. Bowie, 9 Gill. & J. 428 461
Hawkins v. Glenn, 131 U. S. 319 439
Haynes v. Schwartz Co., 32 Pac. Rep. 220 20
Herlow v. Orman, 3 N. M. (Gil.) 471 617
Hickory v. United States, 160 U. S. 409 550
Higbee v. McMillen, 18 Kan. 133 395
Hill v. People, 16 Mich. 351 158
Hirbour v. Reeding, 3 Mont. 13 702
Holford v. Alexander, 12 Ala. 280 461
Holland v. Challen, 110 U. S. 15 ..... 355, 369
Hollingsworth v. Duane, Wall. Sr. (77 Fed. Cas. No. 6616) 238
Hollins v. Iron Co., 150 U. S. 371 ..... 424, 431, 441, 630
Hough v. Cress, 4 Jones (N. C.) 427
Howell v. Foster, 65 Cal. 169 395
Hoyt v. Hoyt, 69 Iowa, 174 633
Hozack v. Rogers, 4 Paige Ch. 603 612
Hunnicutt v. Peyton, 102 U. S. 333 353

In re Cheltenham, L. R. 8 Eq. 580 238
In re Crawford, 13 Jur. 955 238
In re Friedrich, 51 Fed. Rep. 747 139
In re Hamlin, 3 Dill. 290 632
In re Lancaster, 11 Sup. Ct. Rep. 117 33
In re Lennon, 150 U. S. 393 657
In re Merrill, 32 Vt. 338 608
In re Thomas, 36 Fed. Rep. 242 325
Insurance Co. v. Parlin, 33 Pa. 360 400
Insurance Co. v. Stevens, 48 Ill. 33 186
Iron Co. v. Meeker, 109 U. S. 180 83

Jackson v. Moore, 6 Cow. 706 62
Jackson v. Roby, 109 U. S. 622 131
James v. Hubbard, 1 Paige, 228 367
Jeff v. State, 37 Miss. 321 586
Jennings v. Monks, 4 Metc. (Ky.) 106 63
Jones v. Comm., 12 S. E. Rep. 226 384
Jones v. Green, 1 Wall. 330 ..... 363, 426
Jones v. Guaranty Co., 101 U. S. 622 131
Jones v. Habersham, 107 U. S. 174 339
Jones v. State, 13 Tex. 168 671
Joy v. St. Louis, 11 Sup. Ct. 243 338

Kelly v. United States, 27 Fed. Rep. 616 ..... 491, 494
Kernodle v. Gibson, 114 Ind. 451 414
Kidder v. Bennett, 2 N. M. 37 462
Kilkelly v. State, 43 Wis. 604 587
King & Queen v. Walcott, 4 Mod. 400 139
Kingsbury v. Buckner, 134 U. S. 680 88
Kingsley v. Kingsley, 39 Cal. 665 633
Kitchen v. Randolph, 93 U. S. 86 463
Knabb's Appeal, 10 Pa. St. 186 54
Kring v. Missouri, 107 U. S. 221 140
Krippendorf v. Hyde, 4 Sup. Ct. Rep. 27 338
Kurtz v. Moffett, 115 U. S. 487 657

Laird v. Upton, 8 N. M. 409 661
Lamalere v. Caze, 14 Fed. Cas. 965 647
Lamy v. Remuson, 2 N. M. 245 102
Lander v. People, 104 Ill. 248 476
Lawrence v. Tucker, 23 How. 14 131
Le Bean v. People, 34 N. Y. 223 531
Leonardo v. Territory, 1 N. M. 291 ..... 475, 564, 661
Lindsey v. State, 65 Miss. 542 140
Liskosski v. State, 3 S. W. Rep. 698 542
Littler v. Thomson, 2 Beav. 129 238
Livingston v. Anderson, 11 S. Rep. 270 617
Loan Ass'n v. Jagodzinski, 54 N. W. Rep. 102 20
Lyon v. Woods, 153 U. S. 649 195

Maher v. People, 10 Mich. 212 ..... 552, 586
Mansfield v. State, 41 Mo. 471 158
Marley v. Ennis, 2 Colo. 703 177
Marshall v. Bunker, 40 Iowa, 121 395
Mattox v. United States, 146 U. S. 149 (13 Sup. Ct. 50) 183, 670
McBean v. State, 53 N. W. Rep. 497 138
McCoy v. Bruner, 61 Mich. 362 629
McCrimmon v. Linton, 36 Pac. Rep. (Colo.) 300 633
McGann v. Hamilton, 19 Atl. Rep. 376 384
McGourky v. Railway, 146 U. S. 536 83
McKee v. Nelson, 4 Cow. 355 520
McKinney v. Western, etc., 4 Iowa, 420 461
McNevins v. People, 61 Barb. 307 209
Meyers v. Trimble, 3 E. D. Smith, 612 611
Miller v. Davidson, 44 Am. Dec. 715 363
Miller v. Price, 20 Wis. 120 645
Milton v. State, 6 Neb. 136 506
Minor v. Marshall, 6 N. M. 195 48
Monty v. Lavelle, 18 Pac. Rep. (Cal.) 803 ..... 177, 702
Moore v. Herron, 17 Neb. 697 395

Morgan v. State, 33 Ala. 413 586
Morley v. Metamora, 78 Ill. 394 6
Moritz v. Lavelle, 77 Cal. 10 702
Murphy v. Comm., 1 Metc. (Ky.) 365 158
Murrill v. Neill, 8 How. 414 631
Nelson v. Campbell, 28 Pa. St. 156 60
Noonan v. Braley, 2 Black. (U. S.) 499 65

Ogden v. Saunders, 12 Wheat. 213 197
Oney v. Clenderin 28 W. Va. 34 565
Opinion of Justices, 41 N. H. 550 158
Orchard v. Hubes, 1 Wall. 73 65
Orton v. Smith, 18 How. 265 369
Otis v. Rio Grande, 1 Woods, 279 31
Otmer v. People, 76 Ill. 149 16

Pacific Gold Co. v. Skillicorn, 8 N. M. 8 550
Padilla v. Territory, 8 N. M. 562 661
Paradine v. Jane, Aleyn, 26 407
Parker v. Canfield, 37 Conn. 250 645
Paulette v. Brown, 30 Cal. 156 13
Payne v. Sheldon, 63 Barb. 161 367
Peas v. Burrows, 29 Atl. Rep. 1061 519
Pegg v. Davis, 2 Blackf. 281 430
Penock v. Dialogue, 2 Pet. 1 519
People v. Belencia, 21 Cal. 544 506

People v. Casey, 72 N. Y. 393 483
People v. Casey, 65 Cal. 260 561
People v. Chambers, 42 Cal 201
People v. Clark, 8 N. E. Rep. (N. Y.) 38 480
People v. Commissioners, 82 N. Y. 459 695
People v. Coughlin, 32 N. W. Rep. 905 561
People v. Enoch, 13 Wend. 159 474
People v. Fuqua, 61 Cal. 377 70
People v. Hare, 24 N. W. Rep. 843 537
People v. Harris, 43 N. W. Rep. 1060 139
People v. Kinsey, 51 Cal. 278 70
People v. Lee, 17 Cal. 76 74
People v. Marshall, 44 Pac. Rep. 718 561
People v. Mather, 4 Wend. 229 477
People v. Murray, 41 Cal. 66 571
People v. O'Neil, 48 Cal. 257 158
People v. Phipps, 39 Cal. 326 570
People v. Shem Ah Fook, 64 Cal. 380 74
People v. Stapleton, 33 Pac. Rep. (Colo.) 167 247
People v. Strong, 30 Cal. 156 13
People v. Willett, 36 Hun. 500 555
People v. Wilson, 64 Ill. 221 235
Perkins v. Fourniquet, 6 How. 206 83
Pettyplace v. Groton Bridge, 61 N. W. Rep. 266 400
Pleyte v. Pleyte, 24 Pac. Rep. 579 494
Pollard v. People, 69 Ill. 148 15
Pond v. Kimball, 101 Mass. 107 633
Porter v. Steel Co., 122 U. S. 267 688
Public Works v. Columbia, 84 U. S. 521 363
Pulliam v. Christian, 6 How. 209 84

Railroad v. Alsbrook, 146 U. S. 279 696
Railroad v. Baldwin, 103 U. S. 430 686
Railroad v. Barney, 113 U. S. 618 690
Railroad v. Garland, 3 Pac. Rep. (Mont.) 144 690
Railroad v. Hanson, 14 S. W. Rep. 892 617
Railroad v. Peniston, 18 Wall. 5 680
Railroad v. Saco, 60 Me. 196 695
Railroad v. Shelly, 14 S. W. Rep. 890 617
Railway v. Bailey, 43 Ill. App. 292 534
Railway v. Ham, 114 U. S. 587 438
Railway v. McGee, 115 U. S. 469 686
Railway v. O'Reilly, 158 U. S. 337 140
Railway v. Roberts, 152 U. S. 116 687
Randolph v. Lampkin, 10 L. R. A. (Ky.) 88 138
Real v. People, 42 N. Y. 282 533
Redewill v. Gillen, 4 N. M. (Gil.) 72 399
Reg v. Carlisle, 2 B. & Ad. 971 456
Reg v. Hill, 5 Cox. Crim. Cas. 259 519
Reg v. O'Dougherty, 5 Cox. Crim. Cas. 348 238
Reg v. Onslow, L. R. 9 Q. B. 219 238
Reg v. Skipworth, L. R. 9 Q B. 219 238
Reid's Adm'r v. Stride's Adm'r, 7 Gratt. 76 461
Respublica v. Oswald, 1 Dall. 319 238
Respublica v. Passmore, 3 Yeates, 441 238
Reynolds v. Bank, 112 U. S. 405 373
Rex v. Davis, 1 B. & P. 336 607
Rex v. Earberry, Fort, 37 456
Rex v. Hubbard, 10 East, 408 608
Rex v. Peteril, 4 Term. Rep. 809 607

Rex v. Perrott, 2 Maule & Selw. 386 527
Rex v. Seton, 7 Term. Rep. 373 456
Rex v. Stokes, Cowp. 136 607
Rex v. West Riding, etc., 7 Term. Rep. 467 456
Rice v. Rex, Cro. Jac. 404 456
Richardson v. Adler, 46 Ark. 43 633
Ridgway v. Grant, 17 Ill. 117 647
Rindskoff v. Lyman, 16 Iowa, 260 664
Ripley v. Mining Co., 6 N. M. 415 421
Roberts v. Comm., 20 S. W. Rep. (Ky.) 267 482
Roberts v. People, 19 Mich. 401 586
Roper v. Sangamon Lodge, 91 Ill. 521 6
Ross v. Steel Works, 34 Ill. App. 323 494
Ruhe v. Abren, 1 N. M. 247 102
Russell v. Clark's Ex'rs, 7 Cranch, 87 361

Sanborn v. Murphy, 25 S. W. Rep. 459 365
Sanders v. Keber, 28 Ohio St. 630 400
Sanders v. State, 85 Ind. 318 460
Sanger v. Upton, 91 U. S. 56 433
Savings Bank v. Creswell, 100 U. S. 600 367
Schneider v. Lee, 17 Pac. Rep. 269 406
Secon v. Leroux, 1 N. M. 390 490
Segrist v. Crabtree, 131 U. S. 287 401
Shepherd v. People, 25 N. Y. 414 140
Shields v. Bryan, 3 Bibb. (Ky.) 525 430
Shirras v. Craig, 7 Cranch, 35 131
Short v. McGruder, 22 Fed. Rep. 46 633
Sierra Co. v. Dona Ana Co., 5 N. M. 190 ..... 564, 602
Simpson v. State, 59 Ala. 10 586
Singer Mfg. Co. v. Senn, 7 Mo. App. 585 395
Skinner v. Shannon, 44 Mich. 86 629
Slidell v. Grandjean, 111 U. S. 424 195
Smelting Co. v. Kemp, 104 U. S. 636 174
Smith v. Kingsley, 19 Wend. 620 461
Soper v. Hawkins, 56 Mich. 527 395
Spaulding v. People, 7 Hill, 301 247
Sparf v. U. S., 156 U. S. 51 558
Spiegelberg v. Mink, 1 N. M. 308 ..... 565, 661
Stanley v. Green, 12 Cal. 148 62
Stark v. Starr, 6 Wall. 402 369
Starns v. State, 61 Ind. 360 565

State v. Alexander, 66 Mo. 148 580
State v. Bowden, 18 Fla. 17 633
State v. Cox, 8 Ark. 436 158
State v. Daily, 45 Mo. 154 500
State v. Everett, 14 Minn. 447 158
State v. Farrar, 104 N. C. 702 494
State v. Faulds, 42 Pac. Rep. (Mont.) 285 244
State v. Frew, 24 W. Va. 416 239
State v. Gassert, 65 Mo. 354 559
State v. Grossheim, 44 N. W. Rep. (Iowa) 541 157
State v. Hill, 69 Mo. 451 560
State v. Huff, 11 Nev. 21 470
State v. Kaufman, 51 Iowa, 581 157
State v. Kent, 62 N. W. Rep. 638 537
State v. Mace, 76 Me. 64 528
State v. Madigan, 51 Minn. 425 526
State v. Martin, 8 S. W. (Mo.) 217 565
State v. McKensie, 102 Mo. 620 555

State v. Meyers, 68 Mo. 266 151
State v. Miller, 13 S. W. Rep. (Mo.) 832 ..... 483, 538
State v. Morrill, 16 Ark. 384 238
State v. Nelson, 101 Mo. 477 414
State v. Pagels, 92 Mo. 300 463
State v. Payne, 39 Pac. Rep. (Wash.) 506, 556
State v. Pfefferle, 12 Pac. Rep. (Kan.) 406 480
State v. Primm, 61 Mo. 166 494
State v. Pugh, 15 Mo. 509 219
State v. Sackett, 38 N. W. Rep. 773 157
State v. Shepard, 37 Wis. 395 456
State v. Stewart, 29 Mo. 419 586
State v. Swartz, 9 Ind. 221 565
State v. Thompson, 113 N. C. 638 526
State v. Turner, Wright, 26 506
State v. Van Matre, 49 Mo. 268 158
State v. Vaughan, 39 Pac. Rep. 733 554
State v. Wingo, 66 Mo. 181 555
Stebbins v. Anthony, 5 Colo. 342 494
Stephens v. Bradley, 2 S. Rep. (Fla.) 667 494
Stewart v. Brown, 37 N. Y. 350 ..... 629, 631
Stokes v. People, 53 N. Y. 164 ..... 506, 531, 559
Story v. Ragsdale, 30 Mo. App. 196 565
Strode v. Stafford, 1 Brock. U. S. C. 162 461
Struckman v. State, 7 Tex. App. 581 572
Stuart v. People, 3 Scam. 405 238
Studley v. Hall, 22 Me. 198 671
Sturoc's Case, 48 N. H. 428 243
Swaggerty v. Caton, 1 Heisk. (Tenn.) 202
Swan v. People, 98 Ill. 610 16

Tabb v. Williams, 4 Jones (N. C.) 352 427
Taylor v. Bowker, 111 U. S. 110 425
Taylor v. Savings Bank, 50 Fed. Rep. 289 88
Telegraph Co. v. Railway, 11 Fed. Rep. 1 341
Telegraph Co. v. Telegraph Co., 96 U. S. 1 341
Tenney's Case, 23 N. H. 162 239
Territory v. Abeita, 1 N. M. 546 74
Territory v. Aguila, 8 N. M. 496 514
Territory v. Anderson, 4 N. M. (Gil.) 213 ..... 74, 662
Territory v. Baker, 4 N. M. (Gil.) 236 ..... 74, 541, 564
Territory v. Barrett, 8 N. M. 70 570
Territory v. Cook, 17 Pac. Rep. 10 6
Territory v. Daniels, 22 Pac. Rep. 159 202
Territory v. Fewel, 5 N. M. 34 580
Territory v. Friday, 8 N. M. 204 ..... 503, 514, 541, 583
Territory v. Hicks, 6 N. M. 596 501
Territory v. Kelly, 2 N. M. 300 183
Territory v. Lucero, 8 N. M. 543
Territory v. Maxwell, 2 N. M. 250 485
Territory v. Nichols, 3 N. M. (Gil.) 103 208
Territory v. O'Hara, 44 N. W. Rep. 1008 482
Territory v. O'Donnell, 4 N. M. (Gil.) 196 ..... 414, 519, 564
Territory v. Pridemore, 4 N. M. (Gil.) 275 579
Territory v. Romero, 2 N. M. 474 105
Territory v. Romine, 2 N. M. 114 ..... 139, 208, 506
Territory v. Salazar, 8 N. M. 1 406
Territory v. Webb, 2 N. M. 154 ..... 96, 105
Territory v. Yarberry, 2 N. M. 391 ..... 102, 564
Territory v. Young, 2 N. M. 93 208

Terry v. Anderson, 95 U. S. 628 ..... 426, 436
Terry v. Tubman, 92 U. S. 160 427
Thayer v. Comm., 12 Metc. (Mass.) 9 460
Thomas v. State, 103 Ind. 419 469
Thomson v. Dean, 7 Wall. 342 83
Thompson v. Maxwell, 95 U. S. 398 89
Thorwegan v. King, 111 U. S. 549 519
Tome's Appeal, 50 Pa. St. 285 605
Traphagen v. Burt, 67 N. Y. 30 700
Tremble v. Territory, 3 Wyo. 280 555
Trujillo v. Territory, 7 N. M. 44 ..... 96, 519, 560
Trust Co. v. Atlantic & Pac. R. Co., 63 Fed. Rep. 513 338
Tufts v. Cleveland, 3 S. W. Rep. 288 400
Tufts v. D'Arcambal, 48 N. W. Rep. 497 400
Tufts v. Thompson, 22 Mo. App. 564 406
Tube Works v. Ballou, 143 U. S. 523 425
Turpin v. State, 80 Ind. 148 469
Tuttle v. Montford, 7 Cal. 358 48
Twyne's Case, 1 Smith Lead. Cas 399
Tyra v. Comm., 2 Metc. (Ky.) 1 158

Ufford v. Wilkins, 33 Iowa, 110 62
United States v. Armstrong, 2 Curt. C. C. 445 560
United States v. Arrendondo, 8 Pet. 420 695
United States v. Barker, C. C. 175 406
United States v. Bayle, 1 Fed. Rep. 784 322
United States v. Biena, 8 N. M. 99 670
United States v. Boyd, 5 How. 50 8
United States v. Breit, 20 How. 352 564
United States v. Cassidy, 67 Fed. Rep. 703 477
United States v. Coppersmith, 4 Fed. Rep. 198 322
United States v. Daubner, 17 Fed. Rep. 793 322
United States v. De Amador, 6 N. M. 173 519
United States v. Eckford's Ex'rs, 1 How. 250 7
United States v. Gibson, 1 Idaho, 364 458
United States v. Hock, 8 Pet. 271 631
United States v. Moore, 3 MacArthur, 227 29
United States v. Nunnemacher, 7 Biss. 111 477
United States v. Plummer, 3 Cliff. 58 460
United States v. Railroad, 12 Wall. 362 689
United States v. Railway, 150 U. S. 12 ..... 689, 695
United States v. Reid, 12 How. 361 670
United States v. Smith, 1 Bond C. C. 70 406
United States v. Stone, 106 U. S. 527 8
United States v. Strobach, 48 Fed. Rep 29
United States v. Vigil, 7 N. M. 296 322
United States v. Vigil, 10 Wall. 424 494
United States v. Wood, 33 Pac. Rep. 59 531
United States v. Yates, 6 Fed. Rep. 861 322

Vaiden v. Bell, 3 Rand. (Va.) 448 416
Valdez v. Archuleta, 3 N. M. (Gil.) 296 617
Vandyne v. Vanness, 1 Hals. N. J. 485 60
Van Wezel v. Van Wezel, 3 Paige ch. 38 612
Vault Co. v. McNulte, 14 Sup. Ct. 915 338
Vawter v. Comm., 12 S. E. Rep. 339 384

Wadham v. Swan, 109 Ill. 46 62
Waite v. Matthews, 50 Mich. 392 629
Wakefield v. State, 41 Tex. 553 186

Waldo v. Beckwith, 1 N. M. 103. 490
Warren v. Baxter, 48 Me. 194..... 186
Washington v. State, 53 Ala. 29. 586
Watson v. Trambly, 60 N. H. 491..... 532
Watson v. Williams, 36 Miss. 331..... 242
Webster v. Upton, 91 U. S. 71..... 435
Wehrman v. Conklin, 155 U. S. 314. 351
Welland v. Huber, 203..... 702
Wheeling & B. Bridge Co. v. Bridge Co., 138 U. S. 287..... 83
Whitehead v. Shattuck, 138 U. S. 150. 355
Wjborg v. United States, 163 U. S. 632..... 477
Wiggins v. Mayer, 18 S. E. Rep. 430..... 18
Wilbor v. Flood, 16 Mich. 43..... 533
Wilkins v. Earle, 44 N. Y. 172 14
Williams v. State, 12 Ohio St. 622..... 158
Wilkins v. Treynor, 14 Iowa, 393..... 395
Wood v. Beath, 25 Wis. 258..... 645
Wood v. Mather, 38 Barb. 473 87
Wood's Ex'r v. Caldwell, 34 Pa. St. 92..... 461
Work v. State, 2 Ohio St. 296..... 158
Wright v. Wright, 34 Ala. 194..... 68

Young v. Templeton, 50 Am. Dec. 563..... 375

STATUTES AND MISCELLANEOUS CITATIONS.

UNITED STATES REVISED STATUTES.

		PAGE.
Section 5438	Making it Unlawful to Present False or Fictitious Claim Against United States, to any Officer in Civil Service	28
2394	Providing for Deficiency or Excess in Running Lines in Government Surveys of Townships	61
1855	Regulating Compensation of Members and Officers of Territorial Legislatures	190
5263	Prohibiting Railroads from Entering into Contracts Granting Exclusive Privileges Over their Right of Way to any Single Telegraph Co	341
1868	Vesting Supreme and District Courts of Territory with Chancery and Common Law Jurisdiction	455
1869	Providing that Writs of Error, Bills of Exceptions and Appeals shall be Allowed in All Cases from Final Decisions of District Courts	455
990	Providing Against Imprisonment for Debt in any State on Process Issuing from any U. S. Court	608

Organic Act.

Section 7	Providing that Legislative Power of Territory shall Extend to all Rightful Subjects Consistent with Constitution of United States	190
10	Vesting Judicial Power of Territory in Supreme, District and Probate Courts, and Justices of Peace	495

Compiled Laws, 1884.

Section 2442	Providing for Writ of Certiorari where Party is Prevented from Appealing from Judgment of Justice Within Ten Days	25
1519	Providing for Mechanic's Lien	48
1520	Enumerating Various Kinds of Property Subject to Lien	49
1522	Subjecting Lands to Lien on which are Improvements	49

Section 1524	Requiring Lien to be Filed Within Sixty Days after Completion of Building	50
2190	Providing for Review of Record by Supreme Court on Appeal	74
2225	Barring Claim Against Estate of Decedent unless Filed with Probate clerk Within Two Years after Death.	109
1865	Providing for Running of Limitation from Time of Discovery of Fraud..	121
2479	Relating to Appeals in Criminal Cases..	135
1566	Requiring Names of Locators of Mines to be Recorded	178
2493	Permitting Parties in Criminal Cases to Testify	207
2055	Providing that the Courts Shall Instruct as to Law of Case, but shall not Comment on Weight of Evidence...	209
1890–1892	Relating to Petition by Intervention...	338
2214	Providing that Actions to Quiet Title to Land May be Brought by Anyone Having an Interest Therein	368
634,635,638	Providing for Selection of Petit Jurors.	382
2395	Providing for Assessment of Damages in Replevin Before Justice in Case of Failure to Prosecute to Final Judgment	393
2197	Requiring Exceptions to Decision of Court, upon Any Matter of Law, to be Taken at the Time	413, 564
1977–1978	Requiring Bond in Actions of Replevin Against Sheriff	415
1846	Providing that in all Cases of Joint Obligations of Partners, Suits May be Brought Against Any One or More.	421
1886	Providing that Suit May be Brought Against Partnership as Such or by or Against all or Either of Partners	421
2194	Providing for Bringing Cause into Supreme Court upon a Praecipe at any Time within One Year.	456
2199	Proving that No Writ of Error Shall be Allowed by Supreme Court, Except within One Year After Judgment	457
2484	Providing that in Criminal Cases the Common Law as Recognized in United States shall be Rule of Practice and Decision	460
2468–2473	Providing for Appeals in Criminal Cases.	461
2201	Providing that Appellants in Criminal Cases Appealed Shall not be Required to Print Record	462
543	Directing Courts to be Held in Different Counties, and Authorizing their Continuance Until Adjourned by Order of Court	465
552	Authorizing Special Terms of Court	466

Section 2087.....Authorizing the Impeachment of Credit of Witness by Evidence of his Bad Moral Character 482

1836..... .....Allowing Nunc Pro Tunc Entries Whenever the Ends of Justice Require it..... 493

2476.....Requiring Clerk of District Court to send up Record Without Delay when Appeal Operates as Stay of Proceedings..... 499

2477.....Providing that when Appeal does not Operate as Stay of Proceedings Transcript shall be Sent up on Application of Appellant..... 499

2054.....Requiring Court to Instruct Jury as to Law in all Cases..... 502

712.....Providing Against Assault with Intent to Maim, Disfigure, etc . 585

713.....Providing Against Assault with Intent to Kill and Murder..... 585

2228.....Providing for Resort to Real Estate when Personal Estate of Decedent is Insufficient..... 594

2229.....Requiring Administrator or Executor to Present to District Court Petition Showing Amount and Value of Personal Estate 594

2239.....Requiring Court, upon Hearing of Cause, to Hear Proofs as to Matters Alleged in Petition..... . 594

2249.....Providing for Assessment of Moneys Arising from Sale of Real Estate in Hands of Personal Representative. 594

2157.....Providing for Execution in Conformity to Judgment or Decree 606

2158.....Providing for Execution Against Goods, Chattels, Lands and Body of Defendant Against Whom Judgment Rendered 606

2183.....Providing that Execution Shall Not Issue Against Body of Execution Debtor, except in Cases of Fraud and Personal Injuries 606

1087.....Providing that all Property Owned by Married Women at Time of Marriage shall Remain their Separate Property 618

1088.....Providing that Married Women Shall be Bound by their Contracts and Responsible for their Torts, and their Property Liable as if Unmarried... 618

1089.....Providing that no Married Woman shall be Liable for Debts of Husband, nor Husband for Debts of Wife except for Necessaries Furnished after Marriage 620

1889.....Providing that all Contracts, which by Common Law are Joint Only, shall be Held to be Joint and Several..... 620

Section 1911		Providing that Each Party may Amend by Leave of Court, at any Time Before Verdict, Judgment, or Decree	620
1859		Providing for Dismissal of Cause by Plaintiff, at his Cost, at Any Time before Submission of Case	621
1, 10, 19, 35		Relating to Exemptions	627
2901		Enumerating Occupations upon which License Taxes are Imposed	637
2903		Requiring Assessors to Prepare List of Persons Liable for License Taxes and Return to County Clerk	637
2904		Providing for Collection of License Taxes by Collector	638
2906, 2907		Providing for Penalty if Licenses not Paid Within Twenty Days, and Empowering Collector to Distrain for Nonpayment	638
2909		Allowing Collector Commission on License and Taxes Assessed and Approved by County Court	638

MISCELLANEOUS LAWS.

Laws 1891,	sec. 4	Providing for Filing of Pleading and Service on Opposite Party	20
1889, ch. 48,		Providing for Distinct Remedy where Justice Wrongfully Refuses to Grant Appeal	27
1878,		Providing Articles of Incorporation shall Show Amount of Stock Actually Subscribed, and by Whom	117
1891,		Permitting Jury to Recommend Clemency	138
1889, ch. 77,		Requiring Defendant's Affidavit for Change of Venue, in Criminal Cases, to be Supported by Oaths of Two Disinterested Witnesses	183
1887,	sec. 1	Providing for a Commission to Select Grand and Petit Jurors	381
1889, ch. 73,	1	Providing for Record of All Instruments Having Effect of Mortgage or Lien on Personal Property	399
1889,	24	Providing that Defendant shall not be Required to Exercise Peremptory Challenge of Juror until Territory has Passed Upon Such Juror	570
1891,	5	Defining Murder in Second Degree	579
1891,	6	Defining Murder in Third Degree	580
1889, ch. 90,		Amending Laws Relating to Estate of Decedents	619
1891, 9,		Making it Misdemeanor to Sell Liquor Without License	638

REPORT OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

[No. 595. August 24, 1895.]

SCIPIO SALAZAR ET AL., PLAINTIFFS IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT IN ERROR.

COUNTY TREASURER'S BOND, SUIT ON—REPORT TO COUNTY COMMISSIONERS—EVIDENCE—ESTOPPEL IN PAIS.—In an action of debt against the principal and sureties on a county treasurer's bond, for the recovery of certain moneys claimed to be due from defendants on account of a breach of the conditions of the bond, where it appeared that the treasurer served one full term and part of a second term, and the bond was given at the beginning of the second term, a report by the treasurer, as to funds in his hands, made during the second term and after the filing of the bond, and approved by the county commissioners, did not estop the sureties from showing that the default occurred during the first term.

ERROR, from a judgment for plaintiff, to the Fifth Judicial District Court, Lincoln County. Judgment reversed.

The facts are stated in the opinion of the court.

JOHN Y. HEWITT and H. B. FERGUSSON for plaintiffs in error.

The sureties on the treasurer's bond had a right to be heard to deny the truth of his report, and could not

be concluded thereby. United States v. Boyd et al., 5 How. 30.

They were not liable for the default of the treasurer during any period not covered by the bond sued on. Baylie on Sur. and Guar. 127, 128, sec. 8; Id., sec. 9; Rochester v. Randall et al., 105 Mass. 295; Farrar et al. v. United States, 5 Pet. 373; United States v. Boyd et al., 5 How. 30; Murfree on Official Bonds, sec. 300, and cases cited.

Funds collected during a subsequent term can not be applied to replace a shortage accruing during a former term, so as to fix the liability on the sureties under a subsequent bond. United States v. Linn, 2 McLean, 501; Jones v. United States, 7 How. 681; Meyers v. United States, 1 McLean, 493; Postmaster General v. Norvell, Gilp. 106.

EDWARD L. BARTLETT and G. B. BARBER for defendant in error.

Statements suggesting the existence or nonexistence of a fact in issue, or a fact relevant thereto, if made by a substantial party to the record, or by one identified in legal interest with such party, and during the continuance of such interest, are admissible in evidence against the person by whom or on whose account such statements are made. Best, Prin. Ev. [Am. Ed.] 507, and notes; 1 Greenl. Ev., secs. 169, 212; 2 Whar. Ev., sec. 1075.

Where the surety is sued for the default of his principal, and the principal had notice of the pendency of the suit, the admissions of the principal are evidence against the surety. 9 Am. and Eng. Encyclopedia Law, 344, and notes; 1 Greenl. Ev. [24 Ed.], sec. 188.

Aside from the admissions of the principal, the plaintiff's case was proven by the evidence. Record, pp. 36, 45; Mechem, Pub. Off., sec. 289.

The oral demand made upon the treasurer to turn over to his successor in office the money found to be

due, was sufficient, the statutes of the territory not requiring a demand in writing to be made. State v. McIntosh, 9 Ired. (N. C.) 307, 496; 19 Am. and Eng. Encyclopedia Law, 544, 545, and cases cited in notes; Am. Dig. 1891, p. 955, sec. 101, and cases cited.

A county treasurer failing to turn over to his successor in office moneys found to be due, a breach of the conditions of his bond thereby occurs, and an action may be maintained against him and his sureties, and recovery had for all funds converted. 19 Am. and Eng. Encyclopedia Law, 544, 545, and citations; 2 Id., p. 467b, and citations.

The record shows the treasurer made all the accounting required of him by the county commissioners, for his first term of office. Board of Supervisors, etc., v. Alford et al., 3 So. Rep. (Miss.) 246.

Though he made no settlement with the commissioners on the expiration of his first term of office, their negligence in not requiring him to make such settlement, can not be set up, and is no defense, in an action against him and his sureties for the conversion. Board Co. Commissioners v. Sheehan et al., 43 N. W. Rep. (Minn.) 690; Cooley on Taxation, 503, 504.

The only facts provable in trials at law are such as are put in issue by the pleadings, and facts relevant thereto. Best, Prin. Ev. [Am. Ed.], 257, 259; 1 Chitty, Pl., p. 652.

In an action on specialty or covenant, the plea of non est factum operates as a denial of the execution of the deed in point of fact only; all other defenses must be pleaded specially. 5 Am. and Eng. Encyclopedia Law, p. 175, and citations in note.

In an action of debt on a bond, the defendant must specially plead his defense, when it consists of payment of bond or any matter in excuse of it. 1 Chitty, Pl., p. 484.

In an action upon a treasurer's bond, reports made and filed by him estop him and his sureties from setting

up matters to contradict such reports. Longan et al. v. Taylor et al., 22 N. E. Rep. (Ill.) 745.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

While the sureties for a subsequent term are not liable for defaults occurring before the beginning of that term, they are liable for the amount of funds in the hands of their principal at the commencement of their term and carried forward from a prior term. Mechem, Pub. Off., sec. 287; U. S. v. Boyd, 15 Pet. 187.

The principal defendant is estopped from denying his own statement or setting up his own fraud, and so are his sureties upon the same principle. United States v. Girault et al., 11 How. 22; Roper et al. v. Sangamon Lodge, 91 Ill. 521.

Defendant and his sureties are concluded from denying that any balance did not come into his hands as treasurer, as any such balance was transferred, by law, to his second term. City of Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 195, et seq.

Sureties can make no defense that their principal could not make. Boone County v. Jones et al., 2 N. W. Rep. 987–995. Affirmed on rehearing, 7 Id. 155; Stovall v. Banks, 10 Wall. 588.

The sureties as well as the principal on a treasurer's bond are precluded from denying that the treasurer had in his hands moneys as reported by him. Territory v. Cook et al., 17 Pac. Rep. (Ariz.) 10; Longan et al. v. Taylor, 22 N. E. Rep. (Ill.) 745; Board of Supervisors v. Alford et al., 3 So. Rep. (Miss.) 247, 248; Crawn v. Commonwealth, 4 S. E. Rep. (Va.) 724.

Sureties are not released by the delay, negligence, or laches of government officials, even though the delay is great, or the laches gross, nor by the fact that such official knew at the time they took the bond that the officer had been a defaulter in a previous term. Mechem, Pub. Off., secs. 308, 309.

BANTZ, J.—This is an action against the principal and sureties, brought on the official bond of Scipio Salazar, former treasurer of Lincoln county. Salazar served one full term and about half of the second term. At the trial the plaintiff below introduced a report made by Salazar, as treasurer, to the board of county commissioners, in which he reported that he had in his custody, as treasurer, the sum of $13,069.83 This report was made during his second term. On the same day the board approved it, and thereupon he tendered his resignation, which was accepted "with regrets." But he was unable to turn over a large portion of the money reported. The bond sued on was given at the beginning of the second term, and before the report was filed. There was no evidence of any report made by Salazar to the board prior to that time, or at the conclusion of his first term; nor was there any evidence of any settlement between him and the board at the conclusion of his first term, ascertaining the amount on hand. The sureties attempted to introduce testimony as to the condition of the treasurer's account during his first term, showing debits and credits, and offered to prove that he was in arrear during his first term, and did not have any money, as treasurer, at the conclusion of that term. The court below rejected the testimony so tendered, and a verdict and judgment was rendered against the defendants, who have brought this case here on writ of error.

If the fact be that the treasurer was a defaulter during his first term, and not during his second term, it is conceded that the bond sued on would not ordinarily be liable; but it is urged that the report made by the principal, and its approval by the board, estopped the sureties from showing that the default occurred during the first term. The report was made and approved on the day Salazar resigned, and this action

SUIT on county treasurer's bond: report to county commissioners: evidence: estoppel in pais.

was brought almost immediately afterward. There was, therefore, manifestly, no estoppel in pais. If the sureties are precluded from showing when the default actually occurred, it arises either because the recorded proceedings of the board imported the conclusive verity of a judgment roll of a common law court, or because the report and its approval became a contract. But even a judgment would not be conclusive upon sureties who were not parties, and who had no opportunity to defend; and a contract between the principal and the board, fixing the debt, would not be within the condition of the bond, conditioned, as it was, for the faithful discharge of certain duties. If, in reporting that he had on hand $13,068.83, the treasurer reported an untruth, it would have been a technical breach of his bond, but no actual loss would have been suffered from the untrue statement. The damage would be merely nominal. Moreover, no breach was assigned for failing to make true report, but the breach charged was the refusal to pay over the balance reported to the board and found by it to be correct. The pleader has treated the report and its approval as, not the mere evidence of liability, but as the things to be proved, and as in some way conclusive. Upon this point the cases of Roper v. Sangamon Lodge, 91 Ill. 521; Morley v. Town of Metamora, 78 Ill. 394; City of Chicago v. Gage, 95 Ill. 593, and Territory v. Cook 17 Pac. Rep. (Ariz.) 10—are not pertinent. In these cases the bonds were made at the commencement of the second term, after an accounting, and an ascertainment of the amount in the hands of the principal at the conclusion of the first term; and it was either held that the sureties could not dispute the amount which had been ascertained when their obligation was entered into, or that such official reports formed the basis of the fiscal concerns and financial policy of the municipal government, so that great public injury would result if they were

subject to falsification after they had entered into governmental action. Neither of these reasons applies to the facts of this case. In an early case in Virginia it was held, by a majority of the court, that the principal and his sureties were conclusively bound by the settlement made between the principal and a county board, entered of record in the proceedings of the board. Baker v. Preston, 1 Gilmer, 235. This case has been approved in Illinois and some other states, and also in Arizona; but it is opposed by the great weight of authority, and is not in harmony with sound principle. In a later Virginia case (Craddock v. Turner, 6 Leigh, 124), Judge Tucker says that the opinion in Baker v. Preston "has certainly not been acceptable to the profession." In State v. Rhoades, 6 Nev. 352, the court say that "it is at variance with all the cases we have been able to consult, both American and English." And, though Baker v. Preston was at one time followed in Indiana (State v. Grammer, 29 Ind. 530), it was afterward repudiated (Lowry v. State, 64 Ind. 421). Baker v. Preston seems to have been since overthrown in Virginia, in Board v. Dunn, 27 Grat. 622. The rule generally recognized is thus stated in Brandt, Suretyship, section 522: "The entries made by an officer in public books, while in the discharge of his duty, or returns made by him to public authorities, are generally prima facie—but not conclusive—evidence against his sureties of the facts thus stated." To the same effect is Mechem, Pub. Off., sections 287–289. The leading case on this subject is U. S. v. Eckford's Ex'rs, 1 How. 250, where the default actually occurred during the first term of a collector, but the bond sued on was given during the second term. It was contended that the duties of the treasury officers charged with the settlement of these ascounts were in their nature judicial, and that when the account is once settled it is conclusive on the government, and could only be opened for

correction by a suit in equity. But the court held: "The amount charged to the collector at the commencement of the term is only prima facie evidence against the sureties. If they can show, by circumstances or otherwise, that the balance charged, in whole or in part, had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied." This was followed in U. S. v. Boyd, 5 How. 50, where it was said that: "Sureties can not be concluded by a fabricated account of their principal with his creditors. They may always inquire into the reality and truth of the transaction existing between them." See, also, Bruce v. U. S., 17 How. 437, and U. S. v. Stone, 106 U. S. 527, 1 Sup. Ct. 287, expressly approving U. S. v. Eckford's Ex'rs.

The testimony offered by the sureties tended to prove the fact that no default occurred in the second term of Salazar as treasurer (State v. Rhoades, 6 Nev. 352), and should have been received in evidence, and the cause should therefore be reversed, and remanded for a new trial.

SMITH, C. J., and COLLIER, HAMILTON, and LAUGHLIN, JJ., concur.

[No. 540. August 28, 1895.]

PACIFIC GOLD COMPANY, PLAINTIFF IN ERROR, v. WILLIAM SKILLICORN & LANSON A. SNYDER, DEFENDANTS IN ERROR.

WITNESS—INSTRUCTION AS TO CREDIBILITY.—An instruction that, if the jury believed any witness had testified falsely as to any material matter in issue, they had the right to disregard all the testimony of such witness, unless such testimony was corroborated by other credible testimony, was misleading and erroneous, in omitting the essential element that the witness had knowingly and willfully sworn falsely.

ERROR, from a judgment in favor of defendants, to the Fifth Judicial District Court, Eddy County. Reversed.

The facts are stated in the opinion of the court.

T. B. CATRON and H. L. PICKETT for plaintiff in error.

The court erred in rendering any judgment for defendants in the absence of any plea by them. Gould, Pl. 502, 506; Swan v. Rary, 2 Blackf. 291; Seivers v. McCall, 1 Ind. 393; Miles v. Rose, Hemp. 37; Dart v. Lowe, 5 Ind. 133; Swope v. Ardery, Id. 215; Beaird v. U. S., Id. 220; Rutherford v. Terris, Id. 530; Gage v. Reed, 15 Johns. 403; Yale v. Coddington, 21 Wend. 175; Mayfield v. Bush, 2 Sneed, 444; Potterfield v. Butler, 47 Miss. 170; 12 Am. Rep. 329; Comp. Laws, secs. 1908, 2190.

The court erred in charging the jury: "If you believe that any witness has testified falsely upon a material matter in issue, you have a right to disregard all the testimony of such witness, unless such testimony is corroborated by other credible witnesses." Rapalje on Witnesses, 318, sec. 192; Gottlieb v. Hartman, 3 Colo. 60; People v. Strong, 30 Cal. 156; Poth. on Ob. 227; Brennan v. People, 15 Ill. 511; Quinn v. Rawson, 5 Brad.(Ill.) 131; City of Chicago v. Smith, 48 Ill. 107; Pollard v. People, 69 Id. 148; U. S. Express Co. v. Hutchins, 58 Id. 45; I. M. Bank of St. Louis v. Murdock, 62 Mo. 74; Shenweit v. Brueggestrabt, 8 Mo. App. 47. See, also, C., B. & Q. R. R. Co. v. Boger, 1 Brad. 478; State v. Peace, 1 Jones' Law, 256; State v. Jim, Id. 510; Swan v. People, 98 Ill. 610; Koehucky v. Ross, 16 Abb. Pr. (N. S.) 645, and cases cited; Bonnie v. Earll, 12 Montana, and cases cited. All the interrogatories submitted to the jury should have been answered. Thomp. on Tr., 2032, secs. 2685, 2686;

Summons v. Greathouse, 87 Ind. 205; Buntin v. Rose, 16 Id. 209; Maxwell v. Boyne, 36 Id. 120; First Nat. Bank v. Peck, 8 Kan. 660; Dyer v. Taylor, 17 S. W. Rep. (Ark.) 358; A., T. & S. F. R'y Co. v. Cone, 15 Pac. Rep. 499; 37 Kan. 567; Crane v. Reeder, 25 Mich. 304.

A failure of the court to require an interrogatory to be answered has the same effect as refusing to submit it. Thomp. on Tr. 2033, sec. 2685; City of Wyandotte v. Gibson, 25 Kan. 164.

A failure of the jury to answer a material interrogatory is equivalent to a failure to find a verdict, or a disagreement. Thomp. on Tr., sec. 2686.

Before the defendants were entitled to a verdict, they should have shown that they reached the ground in dispute by following their vien beyond their side lines, descending upon its dip continuously on ore of appreciable value in gold, to the ground in controversy. Rev. Stat., U. S., sec. 2322; 40 Fed. Rep. 787.

As to what constitutes an amended location, its object and purpose, see Strepy v. Stork et al., 5 Pac. Rep. 111.

HAMILTON, J.—This case is brought up by writ of error from the Fifth judicial district. It was an action in ejectment brought by the plaintiff against William Skillicorn and Lanson A. Snyder in the district court of Grant county, in the Third judicial district, and is a suit in ejectment brought for the possession of a mine called the "Pacific Lode," situated in the Pinos Altos mining district, in said county. The mine is particularly described in the declaration, which also asks for judgment, not only for the possession of the mine, but for $25,000 damages. After the suit was brought in Grant county, a change of venue was taken to Eddy county, in the Fifth judicial district, where the case was tried at the November term, A. D. 1892. There

was no plea filed by defendants. The trial resulted in a verdict of not guilty, together with certain special findings made by the jury in the case. Motion for new trial was overruled. The case is brought here by writ of error.

Plaintiffs, to reverse the case, have assigned forty-three grounds of error; but, in the view which we have taken of the case, it will be necessary only to consider the second assignment of error made by the plaintiffs, which is as follows: "The court erred in the thirty-third instruction given to the jury in that it misled the jury by the following words: 'If you believe that any witness has testified falsely upon any material matter in issue, you have a right to disregard all of the testimony of such witness, unless such testimony is corroborated by other credible testimony.'" The whole of the instruction of which this is a part is in the following language: "It is your duty to determine the credibility of the witnesses in this case. If you believe the testimony to be conflicting, you should first endeavor to reconcile the same, if you can. If you can not do so, you must then determine which of the witnesses you will believe. If you believe that any witness has testified falsely upon a material matter in issue, you have a right to disregard all the testimony of such witness, unless such testimony is corroborated by other credible testimony." There are three propositions contained in this instruction. The first proposition is that it is the duty of the jury to determine the credibility of the witnesses, and the weight which should be attached to their testimony; second, that, if the testimony is conflicting, it will be the duty of the jury to reconcile the same, if it can be done, and that, if the testimony can not be so reconciled by the jury, they must then determine which of the witnesses are entitled to belief. This part of the instruction is not

WITNESS: instruction as to credibility.

seriously objectionable, but it is the latter part of the instruction which is complained of, as not having been given in the language required by law. This language to which objection is made in this instruction is as follows: "If you believe that any witness has testified falsely upon a material matter in issue, you have a right to disregard all the testimony of such witness, unless such testimony is corroborated by other credible testimony." It is contended that this part of the instruction has misled the jury, by directing them to disregard the testimony of any witness who had sworn falsely, without regard to whether such testimony had been given knowingly and willfully false. It is certainly the province of the jury, in all cases, to weigh the testimony offered by the various witnesses, and to give to the testimony of such witnesses such credit as they, in their judgment, think it may be entitled to. The jury have a right to disregard the testimony of any witness or witnesses who have testified in the case, provided they believe that such witness or witnesses have willfully and intentionally sworn falsely in any material part of their testimony. Whether the jury will disregard the testimony of any witness must depend upon circumstances. The jurors have a right to exercise their judgment with the same care that a judge would use in weighing the testimony. It is not every unintentional mistake respecting a material fact that will authorize the jury in disregarding the testimony of a witness. If a witness has made a mistake in his testimony, or if he has testified untruly, about any material fact, it may affect his testimony, in the minds of the jury; but the jury are not authorized to disregard the whole of the testimony of the witness simply because he may, by mistake or by misapprehension, have stated what is untrue. The jury must believe that he has testified knowingly and willfully false as to some material portion of the testimony given by him. In

Rap. Wit., sec. 192, he lays down what we consider to be the rule in such cases: "The true rule undoubtedly is that if a witness willfully and knowingly testifies falsely to any material fact in the case, the jury are authorized to discredit and reject the whole of his testimony." This we understand to be the rule which has been followed almost universally by the courts of the country. In the case of Gottlieb v. Hartman, 3 Colo. 59, the court were considering an instruction in the following language: "That they [meaning the jury] are the sole judges of the credibility of the several witnesses, and that if they believe from the evidence that one of the witnesses has spoken falsely, in any particular, then the jury are at liberty to disregard all the evidence of the witness." In considering this instruction, the court say: "A witness, through mistake, from imperfect memory, or through a misunderstanding, may unintentionally tell an untruth in evidence. In such case, although the jury might believe, from all of the evidence, that the witness had testified falsely in some particular, they would not therefore be at liberty to wholly discredit the witness, unless they further believed from the evidence that the witness had intentionally told an untruth." In the case of People v. Strong, 30 Cal. 156, the court, in passing upon an instruction similar to the one under consideration used this language: "As a general proposition, the jury can not be said, of their mere caprice, under the guise of a legal discretion, to disregard the entire testimony of a witness because he may have made an innocent mistake as to a particular fact." The court also, in that opinion, quoting from Pothier on Obligations, use this language: "It is said that if a witness deposes falsely in any part of his testimony the whole of it is to be rejected; and this is certainly correct, so far as the falsehood supposes the guilt of perjury, the ground of credit being thereby destroyed. But if nothing can be imputed to the witness

but error, inaccuracy, or embarrassment,—if there does not appear to be a real intention to deceive or misrepresent,—neither the objection nor the reason for it applies." This question has also been considered by the supreme court of Missouri in the case of Iron Mountain Bank of St. Louis v. Murdock & Armstrong, 62 Mo. 74, in which the court in that case passed upon an instruction in the following language: "If the jury believe from the evidence that any witness has sworn falsely in regard to any material fact in issue, they are at liberty to disregard his entire evidence." The court, in passing upon this instruction, say: "It is not true, as a legal proposition, that because a witness has honestly testified to that which is, in point of fact, untrue, therefore the jury may reject the whole of his testimony. It is only where a witness has knowingly testified to an untruth that an instruction of this character should be given."

An instruction of the nature of the one under consideration should only be given where the testimony in the case is of a character to warrant it, and then it should not be given except in proper form. It is often true, as a matter of fact, that even the best and most reputable citizens of a community, in undertaking to relate the facts and circumstances connected with a particular matter, may differ widely in their versions or statements in relation to it, and may even make statements honestly which, as a matter of fact, are untrue; yet this alone should not furnish a basis for impugning their integrity, or denouncing such persons as wholly unworthy of belief. See, also, the case of Paulette v. Brown, 40 Mo. 52. In the case of Wilkins v. Earle, 44 N. Y. 172, an instruction of this kind was given: "That if the plaintiff's relation of material facts is contradicted in one or more important particulars, about which he can not be deemed simply mistaken, his evidence is not entitled to credit." The judge in-

structed them that they were authorized in that case to disbelieve the plaintiff's whole statement, but were not bound to do so. The court say, in passing upon this instruction: "The request was not correct. The mere fact that his evidence was contradicted as to any fact or facts as to which he could not be simply mistaken was not conclusive as to the falsity of the evidence as to those facts. The jury might have believed the evidence, although contradicted. The jury must believe the evidence to be willfully false in some particular, before they are authorized to discredit the whole evidence of a witness."

The question of the legality of an instruction like that under consideration has been before the supreme court of Illinois in a number of cases, from the earliest history of that state down to the present time, and the courts of that state have uniformly held such an instruction to be improper. In the case of Brennan v. People, 15 Ill. 511, the court used this language: "The nineteenth instruction was erroneous. It authorized the jury to discredit a witness altogether, if he swore falsely in a single particular. It does not follow, merely because a witness makes an untrue statement, that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony, as unworthy of credit, but, if he makes a false statement through mistake or misapprehension, they should not disregard his testimony altogether." This doctrine was followed in the case of Pollard v. People, 69 Ill. 148. In the latter case an instruction almost like the one now under consideration was given, in the following language: "The jury are instructed that if they believed from the evidence that any of the witnesses who have testified on the part of the defense have sworn falsely on any material fact in issue, then they have

the right to entirely disregard their testimony, unless corroborated by other credible evidence in the case." The court, in passing upon this instruction in that opinion, say: "The instruction was clearly wrong. It omits the essential element that the witness has willfully and knowingly sworn falsely;" citing in support of the rule laid down, Brennan v. People, 15 Ill. 512, and city of Chicago v. Smith, 48 Id. 107. This doctrine has been followed by the supreme court of that state in the case of Swan v. People, 98 Ill.610,in which an instruction in the following language was given: "The jury are instructed that if they shall believe any witness or witnesses sworn in this case is or are unworthy of belief, because of his or their manner on the stand, or because of his or their contradictory statements, or because of his or their material points being contradicted by reliable evidence, or because of his or their having heretofore, under oath or otherwise, made statements on material points different from those made by him or them on this trial, then the jury may entirely reject the testimony of such witness or witnesses, except upon the matters wherein they are corroborated by other reliable testimony." The court, in passing upon this instruction, following the rule heretofore stated, used this language: "In all cases, and especially such as this, where the evidence is inharmonious, it is indespensable that the jury should be accurately instructed. The instruction omits the element that the witness must be contradicted on a material point in his testimony, to authorize the rejection of his evidence as being unworthy of belief. Nor does the instruction inform the jury that, to authorize them to reject all of a witness' evidence, he must have knowingly and intentionally made misstatements as to some material point in the case." The court cites, in support of this doctrine, U. S. Express v. Hutchins; 58 Ill. 44; Bonnie v. Earll, 12 Mont. 240; Otmer v. People, 76 Ill. 149; Gul-

liher v. People, 82 Id. 146. It will therefore be seen that the instruction under consideration is almost in the same language as the instructions which are given and passed upon by the court in the two cases last above cited. The latter part of the instruction under consideration, which provides "that the jury have the right to disregard all of the testimony of such witness, unless such testimony is corroborated by other credible testimony," does not cure the instruction; i. e., the clause which provides that the testimony should be corroborated by other evidence does not cure the instruction. It is the lack of the words "knowingly" and "willfully" which destroys this instruction.

Under the authorities above cited, and under the rule as we understand it, which is universally adopted in other states, aside from those which are given, it is clear that the instruction above given does not contain the language which would make it a valid instruction, under the law. It gave the jury the authority to disregard all the testimony of any witness or witnesses who may have testified falsely, regardless of the fact as to whether that testimony was given intentionally or knowingly false. It is not the false statement, alone, of the witness, which will authorize the jury to discredit it, but it is testimony which may be falsely given by a witness, knowingly and intentionally, which destroys it. We therefore conclude that the court erred in giving the thirty-third instruction, and for that reason the case must be reversed and remanded for such further proceedings in the cause as may be proper.

LAUGHLIN and BANTZ, JJ., concur.

[No. 615. August 28, 1895.]

GERMAN-AMERICAN INSURANCE COMPANY, PLAINTIFF IN ERROR, v. CHARLES ETHERIDGE ET AL., DEFENDANTS IN ERROR.

PRACTICE—FAILURE TO SERVE DECLARATION—DISMISSAL OF ACTION.—On a motion to dismiss a cause, for the failure of plaintiff to serve defendant or his attorney with a copy of the declaration within ten days after his appearance, defendant is entitled to a judgment of dismissal, under section 4, Practice Act, 1891, although the declaration be served before the judgment is rendered, where, before such service, the motion to dismiss has been heard and submitted, without any showing by plaintiff for his failure to serve the declaration within the prescribed time.

ERROR from a judgment for defendant, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

BERNARD S. RODEY for plaintiff in error.

W. B. CHILDERS for defendants in error.

The court committed no abuse of discretion in sustaining defendants' motion for dismissal. Practice Act, 1891, secs. 2, 4; Haynes v. Schwartz Co. et al., 32 Pac. Rep. (Wash.) 220.

The court will not set aside a judgment of default occasioned by the negligence of the attorney. Wiggins v. Mayer, 18 S. E. Rep. 430; Milwaukee Mut. Loan Ass'n v. Jagodzinski, 54 N. W. Rep. 102.

The plaintiff's attorney offered no excuse for his failure to serve the defendants with a copy of the declaration, and the court, in sustaining defendants' motion, acted clearly within its powers. Pine Mt. Iron & Coal Co. v. Tabour, 56 N. W. Rep. (Minn.) 895.

LAUGHLIN, J.—On the twenty-fifth day of May, 1881, the defendant in error, Charles Etheridge, being then the local agent of the plaintiff in error, entered into a bond to it in the sum of $500, the conditions of which were that said principal, Etheridge, should well and truly discharge his duties as such agent, and pay over to said company all funds received by him as such agent and due said company. The other defendants in error, W. B. Childers and Jeff Grant, signed and became sureties on said bond. In 1887 Etheridge left the country, and on the twenty-seventh day of April, 1891, declaration was filed by plaintiff in error in this case on the bond against the principal and sureties thereon. Said Etheridge and Grant being nonresidents, defendant Childers was served with process, and he at once appeared and obtained a rule on plaintiff for security for costs, which rule was complied with on May 27, 1891. No other proceedings in case appear from the record until the ninth of October, 1891, when defendant Childers filed his motion to dismiss the case because plaintiff had failed to serve defendant or his attorney with a copy of the declaration within ten days after the return of the writ. The case then remained in "suspended animation" until the twenty-seventh day of April, 1895, when, after the motion was heard and under consideration by the court, and before the decision was rendered, plaintiff's attorney caused to be handed to defendant Childers a copy of the declaration. The court sustained the motion of defendant on the second day of May, 1895, and dismissed the case; and plaintiff thereupon sued out his writ of error, and the case is now before this court on the record.

The contention of the plaintiff in error is that the court below erred in sustaining the motion to dismiss the case after a copy of the declaration had been served on the defendant, pending the motion, and before the

PRACTICE: failure to serve declaration: dismissal of action.

decision of the court had been rendered thereupon, in that the service of the copy cured any laches on his part. The section of the statute governing this case is as follows: "Sec. 4. Within ten days after defendant's appearance is entered plaintiff or his attorney or solicitor, shall deliver to defendant or his attorney or solicitor a copy of the declaration, or bill of complaint; and each successive pleading thereafter shall be filed with the clerk, and a copy served on the opposite party or his attorney, or solicitor, within ten days of the filing, and service of the next preceding pleading. And failure to file and serve a pleading within the required time shall entitle the opposite party, if plaintiff, to a judgment nil dicit, or a decree pro confesso, and if defendant to a judgment or decree of dismissal; provided, such judgment or decree is obtained before the pleading is filed and served." Laws, 1891, p. 122. Plaintiff in error contends that this case comes under the proviso, in that the pleading was served before the judgment of the court had been rendered on the motion. This contention can not be maintained. He made no showing for his failure to comply with the statute, and the court was left without any discretion in the matter. The motion had been heard by the court and submitted, and the only thing left was to sustain or deny it. This was in the nature of a default proceeding, and the court will not set aside a default judgment without a proper showing addressed to the sound discretion of the court, In this case there was no showing or excuse of any kind offered. Haynes v. B. F. Schwartz Co. et al., 32 Pac. Rep. 220; Wiggins v. Mayer, 18 S. E. Rep. 430; Milwaukee Mutual Loan Ass'n v. Jagodzinski, 54 N. W. Rep. 102. Plaintiff in error in this case has allowed it to remain in "a state of innocuous desuetude" for nearly four years, and we think the court would have been sustained in dismissing the case, in

the face of such laches on the part of the plaintiff in error, unexplained, even without the provisions of the statute supra. There being no error of record, the judgment of the court below is affirmed.

HAMILTON and BANTZ, JJ., concur. The CHIEF JUSTICE did not sit in the case, and took no part in this opinion.

[No. 616. August 28, 1895.]

HENRY LOCKHART, PLAINTIFF IN ERROR, v. H. J. WOOLLACOTT, DEFENDANT IN ERROR.

PRACTICE—CERTIORARI—BOND—APPEAL.—Where, upon application, by plaintiff, to the judge of the district court for a writ of certiorari from the judgment of a justice of the peace, under section 2442, Compiled Laws, 1884, requiring the justice to send up a transcript of the record in the cause, in the manner prescribed by said section, and the judge granted the writ, and required plaintiff to file bond within seven days thereafter, in double the amount of the judgment, to be approved by the clerk of said court, which was done, the granting or refusing of the writ, the amount of the bond, and the time within which, it should be filed, were matters resting in the sound discretion of the judge, not reviewable on appeal, where there has been no abuse of such discretion.

ID.—OMISSION OF FIRST FULL NAME OF PLAINTIFF—MOTION TO DISMISS. In such case, a contention that the writ of certiorari should have been dismissed, because the account sued on did not contain the first full name of the plaintiff, raised for the first time in the district court, by motion, instead of by plea, as required by the rules of pleading and practice for the procedure of causes in said court, is not tenable, and and will not be sustained.

ID.—DEFECTIVE BOND—MOTION TO DISMISS.—Though the bond filed in such action was not in exact conformity to the statute, yet was in substantial compliance therewith, was taken and accepted by the clerk of the district court, and there was no motion for a new bond, and defendant was not prejudiced thereby, judgment having been rendered against him in that court, it was sufficient, and the court properly refused to dismiss the writ of certiorari on that ground.

ID.—LAWS, 1889, CHAP. 48—COMP. LAWS, 1884, SEC. 2442.—Chapter 48, Laws, 1889, providing a distinct remedy where a justice of the peace wrongfully refuses to grant an appeal in any case allowed by law, is neither in conflict with, nor an amendment or repeal of, section 2442, Complied Laws, providing for a writ of certiorari where judgment is rendered by a justice of the peace, and a party is prevented or unable, from any cause, to appeal therefrom within ten days.

ERROR, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSSON & GILLETT for plaintiff in error.

This action should have been dismissed for the failure of the plaintiff's Christian name to appear in any of the papers filed in the cause. Prince's Law, 1882, sec. 21.

While these defects may have been amendable, no amendment was made, asked, or allowed below, and the pleadings are insufficient and can not be sustained. Bennett v. Zabriski, 2 N. M. 179.

The Act of 1889, sections 1, 2, is amendatory of section 2442, Complied Laws, and controls the right of a writ of certiorari. If it were not, then the writ was still improvidently allowed, the petitioner not only not having applied to the justice for an appeal, but having also failed to file a bond within thirty days after judgment was rendered, by the justice, with the clerk of the district court. Loose v. Rondema, 38 Pac. Rep. 1012; Grunewald v. W. C. Grocer Co., Id. 1011; Dye v. Noel, 85 Ill. 290; Lord v. Burke, 4 Gill. 363; Tuton v. Larimer, 6 Cal. 290; Fagg v. Parker, 11 Iowa, 18; Uvalde County v. City of Uvalde, 3 S. W. Rep. 327.

The court can not extend the time of filing an appeal bond. Wait v. Van Allen, 22 N. Y. 319.

The bond absolutely fails to provide for payment of any damages whatever. Our statute provides a form for appeal bonds from justices' courts, and they must be followed. Comp. Laws, secs. 2447, 2436, 2187; Figures v. Dunklin, 5 S. W. Rep. 503; Elliott v. Chapman, 15 Cal. 383; Gordon v. Wansey, 19 Id. 82; Armon v. Shellenberger, 42 Id. 277; Reed v. Kimball, 52 Id. 232.

The bond must include all the essentials required by the statute. 1 Encyclopedia Pl. & Pr. 983.

The securities are not bound because the principal did not sign the bond. Bean v. Parker, 17 Mass. 591; Wild Cat Branch v. Ball, 45 Ind. 213; Board of Education v. Sweeney, 48 N. W. Rep. 302; Jones v. Parsons, 2 Yerg. (Tenn.) 321; Am. and Eng. Encyclopedia of Law, 741, 743, and notes.

THOMAS N. WILKERSON for defendant in error.

Judgment having been entered in this case, and the defendant granted a new trial only upon an affidavit of merit, the court can decide the case upon this point. The errors complained of by plaintiff in error having nothing to do with the merits of the case, this action should be dismissed without further consideration by the court. Lavier v. Cock, 6 Munf. (Va.) 580; Murdock v. Herndon, 4 Hen. & M. (Va.) 200.

As to the objection that the plaintiff's Christian name does not appear anywhere in this case, the case of Bennett v. Zabriski, 2 N. M. 179, cited in support of it, has no bearing here, and if it had, was overruled by Robinson v. Hesser, 4 N. M. (Gil.) 282. Moreover this suit was brought on the bill head of the plaintiff, under which name he transacted his business, and that would be his name for the purpose of business. Bell v. Sun Printing Co., 42 N. Y. (S. C.) 57; Petition of Snooks, 2 N. Y. (Hilt.) 566.

When a party is designated in a pleading preceded by one or more capital letters, in the absence of evidence, the court will not presume that he has any Christian name other than such letter or letters. Kinnersly v. Knott, 7 Com. B. 980; S. C., 13 Jur. 658; Nash v. Collier, 5 Dowl. & L. 396; City Council v. King, 4 McCord L. (S. C.) 487.

Where a plaintiff sued as "O. B. Abbott," and obtained judgment, it was held it would not be presumed, for the sake of invalidating the judgment, that he had any other Christian name. Fewlass v. Abbott, 28 Mich. 270.

LAUGHLIN, J.—On the fifth day of October, 1893, H. J. Woollacott filed a suit on an open account for $57.88 against Henry Lockhart, to recover for the price of certain goods, wares, and merchandise, sold and delivered to said Lockhart, before W. H. Burke, justice of the peace for precinct number 12, in said Bernalillo county. On the twentieth day of the same month the defendant filed with said justice of the peace a counterclaim for an amount claimed to be due from plaintiff as unliquidated damages, and the case was tried and judgment rendered in favor of defendant Lockhart for $20. The plaintiff did not take or ask an appeal from the judgment within ten days thereafter; but on the eighteenth day of November, following, and on the twenty-ninth day after rendition of the judgment, plaintiff, by his attorney, made out and presented in writing, under oath, his petition to the judge of the district court for a writ of certiorari, requiring the justice of the peace to send up a transcript and all the papers in the case, in the manner prescribed by section 2442, Compiled Laws, 1884. The judge granted the writ, and required plaintiff to file within seven days thereafter a bond to the adverse party in the sum of $40, to be approved by the clerk of said court, which

was furnished. Defendant moved to dismiss the appeal and quash the writ of certiorari, because of the insufficiency of the bond as to form, and because it was not filed within thirty days from rendition of judgment, and because plaintiff had not asked or taken his appeal within ten days from rendition of judgment, and because the full first name of plaintiff was not given, which motion was by the court denied. On May 2, 1895, the trial was had in the district court without the intervention of a jury, and the court rendered judgment in favor of the plaintiff for $30, costs of suit, and interest. Defendant moved for a new trial on practically the same grounds set up in the motion to dismiss, which motion was denied by the court, from which defendant sued out his writ of error to this court, and the case is here on the record.

Plaintiff in error assigns as errors by the court below that the court erred in overruling the motion to dismiss the writ of certiorari, because the plaintiff below was not sufficiently described, in that his first full name was not given, and because the bond was not filed within thirty days, and because the plaintiff did not take or apply for his appeal within ten days after the rendition of the judgment by the justice of the peace.

The writ of certiorari was granted under the authority found in section 2442, Compiled Laws, 1884.

CERTIORARI: bond: appeal.

This section of the statute is broad and comprehensive in its scope and meaning, and it provides among other things, that: "Whenever judgment shall be rendered by a justice of the peace, and from any cause whatever, either party shall be prevented or shall be unable to appeal within ten days, and he shall believe that injustice has been done him n the trial, if any was had, and in the judgment, he shall make out his petition in writing to the district judge, within thirty days from the rendition of the

judgment setting forth the circumstances of the trial, or as much as shall be necessary, and the reason why he was unable or was prevented from appealing in the ordinary way. * * *" And upon the petition being sworn to, and presented to the judge, he then grants or denies the writ of certiorari, and fixes the bond. This was done in this case, and the bond was filed with the clerk of the court within seven days thereafter, within the time fixed by the judge, and thirty-six days after the rendition of the judgment by the justice of the peace. The statute is silent as to when the bond shall be filed; and the matter of granting or refusing the writ, the amount of the bond, and the time within which it shall be filed, are matters within the sound discretion of the judge, and will not be reviewed unless it be apparent upon the record that that discretion has been abused; and that does not appear in this case, and there was no error in the court below on these points.

OMISSION of first full name: motion to dismiss.

The plaintiff in error contends that the writ of certiorari should have been dismissed because the account sued on did not contain the full first name of the plaintiff. This contention is not tenable, because it was raised in the district court for the first time on a motion, where it should have been raised by plea, in the regular way. When a case once reaches the district court, and that court has acquired jurisdiction of the person and subject-matter, it is tried de novo; and the trial thereafter proceeds according to the rules of pleading and practice prescribed for the procedure of causes in the district court, except as to the form and jurisdiction of the cause, as it originated in the justice court.

DEFECTIVE bond: motion to dismiss.

The second assignment of error is as to the form of the bond, and, while the bond is not within the exact form prescribed by the statute, yet we think, from the fact that the district court gave judgment against the plaintiff in error here and

defendant below, and that he did not, nor could he, suffer any harm from a defective bond, if it was defective, and that the bond was taken and accepted by the clerk of that court, and that there was no motion asking for a new or better bond, and that it is substantially in compliance with law, that it was sufficient; and we think there was no error in the court below denying the motion to dismiss the writ of certiorari on that ground.

There is no conflict between section 2442, Compiled Laws, 1884, and chapter 48, Laws, 1889. Nor does the latter law in any manner repeal or amend the former section. The latter provides a distinct and separate remedy where any justice of the peace "shall wrongfully refuse to grant an appeal in any case where an appeal is now or may hereafter be permitted by law," when the appeal is applied for in the ordinary manner. Believing that substantial justice was done, the judgment of the court below is affirmed.

LAWS, 1889, ch. 48: Comp. Laws, 1884, sec. 2442.

SMITH, C. J., and HAMILTON, J., concur. BANTZ, J., did not sit in the case, and took no part in the opinion.

[No. 634. August 28, 1895.]

IN RE JAMES ADDISON PERALTAREAVIS, PETITIONER.

HABEAS CORPUS—PRESENTATION OF FRAUDULENT CLAIM AGAINST AND CONSPIRACY TO DEFRAUD THE UNITED STATES—COURT OF PRIVATE LAND CLAIMS—JURISDICTION.—By section 14, Act, March 3, 1891, the court of private land claims was created, and given express authority to render judgment against the United States for the value of the lands which the United States may have granted or sold belonging to the claimant, which judgment, it provides, "when found shall be a charge on the treasury of the United States." By section 5438, Revised Statutes of United States, it is made unlawful for any person

to present for payment or approval, to any person or officer in the civil * * * service of United States, any claim against the United States, knowing such to be false, fictitious, or fraudulent * * * or who enters into any conspiracy to defraud the United States, by obtaining the payment of any fraudulent claim, etc. On petition for a writ of habeas corpus for the release of the petitioner from commitment, after a preliminary hearing on the charges of presenting to the court of private land claims a fraudulent claim against and conspiring with another to defraud the United States,—Held: The judge of the court of private land claims is an officer in the civil service of the United States, within the meaning of the statute, and the presentation of such claim to that court, of which he is the presiding officer, was a presentation to "an officer in the civil service of the United States." U. S. v. Strobach, 48 Fed. Rep. 908.

2. Where, as here, the committing court had jurisdiction of the offense charged, the proceedings upon which the prisoner was committed can not be collaterally attacked on habeas corpus.

PETITION for writ of habeas corpus. Writ denied; SMITH, C. J., and COLLIER, J., dissenting.

The facts are stated in the opinion of the court.

CATRON & SPIESS for petitioner.

J. B. H. HEMINGWAY and MATT G. REYNOLDS, United States attorneys, for court of private land claims.

BANTZ, J.—The prisoner was committed to jail, after a preliminary hearing and on the charge (1) of filing in the court of private land claims, a claim against the United States in the sum of $100,000, said claim being false, fictitious, and fraudulent, and known by him to be such at the time; and (2) that he entered into a conspiracy with one Sofia Treadway to defraud the government of the sum of $100,000, in respect to such claim. If the claim had been one for land simply, it is conceded that it would not have been an offense within section 5438, Revised Statutes, United States. The material part of that section is as follows: "Every person who makes or causes to be made, or presents or

causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * * or who enters into any agreement, combination or conspiracy, to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * every person so offending," etc. Then follows the punishment. The information contains two charges: First, presenting a fraudulent claim; and, second, conspiracy to defraud.

By section 14 of the Act of March 3, 1891, creating the court of private land claims, express authority was given that court to render judgment against the United States for the value of the lands which the United States may have granted or sold belonging to the claimant," and such judgment when found shall be a charge on the treasury of the United States." The information specifically avers that the prisoner made a money claim against the United States. The section under which this prosecution was begun (5438) requires that the fraudulent claim shall have been made to some person or officer in the civil, military, or naval service of the United States. It is, among other things, denied that the court of private land claims comes within this description. In U. S. v. Moore, 3 MacArthur, 227, Judge MACARTHUR said that a claim presented against the United States in the court of claims was not presented to a person or officer within the meaning of this act; but the other judges did not concur in that opinion and it was pure obiter dictum. The point arose in U. S. v. Strobach, 48 Fed. Rep. 908, in a prosecution

HABEAS CORPUS: presentation of fraudulent claim against and conspiracy to defraud United States: court of private land claims: jurisdiction.

against a deputy marshal for presenting an account for approval to the district court, and Justice WOODS said: "The contention of counsel for defense is that the law only punishes for presentation to a person or officer in the civil service of the United States of a false claim, and, when a false claim is presented for approval to the district court of the United States in which the district judge is presiding, that that is not a presentation thereof to an officer in the civil service of the United States. In other words, that a United States judge in vacation, and when not engaged in the discharge of his usual duties, is an officer in the civil service of the United States, but when engaged in holding the term of court be ceases to be an officer in the service of the United States, and his identity as such is lost, and he is only a court or a member of a court. We think that a United States judge is at all times an officer in the civil service of the United States, within the meaning of the statute, and that, when a claim is presented to a court of which he is the presiding officer, it is presented to an officer in the civil service of the United States." It may be observed that there is no revising power over the action of the court by the treasury officials in relation to witness and jury fees and mileage.

There is, however, in this case, the charge of conspiracy to defraud the government by means of a false, fraudulent, and fictitious claim. This proceeding by habeas corpus is a collateral attack upon the proceedings upon which the prisoner was committed to jail. In Ex parte Siebold, 100 U. S. 371, Mr. Justice BRADLEY, speaking of the limitations of the jurisdiction of the supreme court on habeas corpus which arise from the nature and objects of the writ, as defined by the common law, lays down the general rule that the only ground on which that court, or any court, without special statute authority, will give relief on habeas

corpus, is where there is want of jurisdiction over the person or the cause, or some other matter rendering the proceedings void, as distinguished from what is merely erroneous and reversible. The writ is not to be employed to take the prisoner away from the court which holds him for fear, if he remains, errors may be committed. Ex parte Crouch, 112 U. S. 178. Nor can it be used to subserve the purposes of the writ of error, and it will not be granted to review the whole case, but only to examine the authority of the tribunal by which the prisoner was committed. Ex parte Virginia, 100 U. S. 339. It has been said that the test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong (Otis v. Rio Grande, 1 Woods, 279), unless, indeed, some punishment in inflicted which the tribunal had no authority to impose. The prisoner's counsel conceded at the bar that the commissioner who held the preliminary examination of and committed the prisoner to custody had jurisdiction of the person and the subject-matter; but it has been earnestly and ably contended that the information charged no offense against the prisoner on which he could be imprisoned or deprived of his liberty. This point was considered in Ex parte Siebold, 100 U. S. 371, and the language of Chief Baron GILBERT in Bushell's case, Vaughn, 135, was quoted, that "if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Mr. Justice BRADLEY, commenting, observes: "The latter part of the rule, when applied to conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as, in effect, to render the proceedings void." It is true that in Ex parte Siebold there had been a conviction and sentence, but, if the objection be not jurisdictional, neither would

the commitment be open to collateral attack by habeas corpus. In Ex parte Coy, 127 U. S. 731, it was strongly insisted that no offense under the act of congress was set out in the indictment, and that the prisoner should be released on habeas corpus. Mr. Justice MILLER says: "It was certainly not intended to say [in Ex parte Wilkins, 5 Pet. 193] that because a federal court tries a prisoner for an ordinary common law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, that he can not be released on habeas corpus because the court which tried him had assumed jurisdiction. In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well defined class of offenses, as forgery of its bonds, or perjury in its courts, its judgment as to what acts were necessary under those statutes to constitute the crime is not reviewable on a writ of habeas corpus." "We are not here to consider it as on a demurrer before trial, but, finding that the district court had general jurisdiction of this class of offenses, we proceed no further in the inquiries on that subject." And he cites with approval Yarbrough's case, 110 U. S. 651. This seems to be within the rule laid down by Judge FOLGER in Hunt v. Hunt, 72 N. Y. 229, who defines jurisdiction of the subject-matter to be "the power to adjudge concerning the general question involved." In Ex parte Parks, 93 U. S. 18, it was held that an indictment could not be collaterally attacked, on habeas corpus, which alleged the forgery of a receipt of a register in bankruptcy, though the statute covered the forgery of certain evidenciary documents. See, also, Hauser v. State, 33 Wis. 678, and

Ex parte Harlan, 27 Pac. Rep. 920. If the prisoner can attack the sufficiency of an information and commitment thereon, like the present, by habeas corpus in this court in advance of his trial in the district court, so may prisoners confined in the jail of every county in the territory attack the sufficiency of indictments against them by habeas corpus in this court, instead of employing a demurrer or motion to quash in the court below. Under such circumstances, the supreme court of the United States have refused to interfere. In re Lancaster (1890), 11 Sup. Ct. 117. We are of the opinion that the commitment was issued in the exercise of the jurisdiction of the subject-matter, and that a sufficient cause is set forth upon which the prisoner should be held.

HAMILTON and LAUGHLIN, JJ., concur.

COLLIER, J. (dissenting).—I am constrained to express my dissent from the conclusion reached by the majority of the court upon this application for a writ of habeas corpus. Such a writ is so sacred to the law, it is such a great writ that it is to be considered like the palladium of liberty, and no question of courtesy, comity, or propriety should for a moment be entertained when it is applied for to a court having jurisdiction to issue it. It is the freeman's writ, and any suggestion of its denial to an American citizen illegally restrained of his liberty seems in conflict with the genius of our institutions. To the argument which proposes hesitation in its issuance because of propriety between courts, or because of propriety for any other reason, in time of peace, an American grown to the stature of these institutions is instinctively opposed. No man should be considered a criminal of so dark a dye, or should be able to defraud his government or his neighbor in so outrageous a manner, that any court could be induced to inflict injury to the vital principle

that every inhabitant of this broad land shall breathe the free air of liberty until he is restrained according to law. It is one of the chiefest praises of the judiciary that, no matter how fiercely popular passion may rage, how red-handed a murderer may be, or how otherwise extreme any violation of law may be considered, it sits in calm deliberation to enforce the law and to make an offender's act become a beacon light in the illumining of liberty's path, instead of creating a precedent for the oppression of its followers. I therefore think that the argument that this court should withhold this writ, when our organic act gives jurisdiction to issue it, because petitioner should have applied to the judge of the district court, or because his alleged monumental and historical fraud calls grievously for redress, is unworthy of a moment's consideration.

No less opposed to the spirit of our law is the doctrine that, by implication and inference, reason may bring within the scope of a criminal statute offenses to which its letter does not extend. It has ever been held, under the common law and in this country, to be a cardinal principle, in the expounding or criminal statutes, that they should be read "in favorem vitae et libertatis," and strictly as against the state. All construction and intendment are against the government and in favor of the accused, though not to the extent of emasculating or destroying a statute. The statute under which the accused is charged has a range very broad and comprehensive, and an utility distinctly manifest, even though it should be held not to reach the character of act described in the complaint upon which petitioner has been arrested and is now detained. No one will dispute that section 5438 of the United States Revised Statutes covers the presentation of false claims against the government for approval and payment by any officer or person given the authority to approve or pay the same, when the scienter is properly

laid and proved. The question here is whether or not a suit begun in the court of private land claims, established by act of congress passed March 3, 1891, comes within the purview of said section, where it appears that plaintiff recites in his petition that land within the exterior boundaries of an alleged grant claimed by him has been disposed of by the United States, and he claims the maximum per acre so disposed of. It is conceded by the attorney for the United States that but for said feature of the claim for land there could be no pretense that section 5438, Revised Statutes, would have any application whatever to the case at bar; and this court in its opinion also proceeds upon that theory. It seems to be minimizing substantials and magnifying accidentals to hold that this section, not otherwise applicable, becomes so by the presence of a provisional money feature in the suit. This feature, if it should ever become material in the litigation begun by the petitioner, becomes so because of acts affecting the petitioner in invitum, and done, not by his procurement or consent, and possibly without his knowledge. This pecuniary feature only becomes material after the land sued for has been "decreed." In other words, when plaintiff's exterior boundaries shall have been adjudicated to him, he can obtain patent only to so much, above what the government has the right to pay him for, at $1.25 per acre, as he recovers, so that it, the govverment, may keep faith with those to whom it has already sold and granted some portions of claimant's land. But the principle here involved arises above what, with respect to my associates, I deem a consideration too small for their intelligent attention; and this decision may, I fear, become a precedent for statutory construction harmful in the extreme. There can be no question here of collateral attack, if no offense is charged, and I would wish no other authority than the one cited by the court of Ex parte Siebold,

100 U. S. 371: "A court will give relief on habeas corpus where there is want of jurisdiction over the person or the cause or some other matter rendering the proceedings void." If no offense is charged, is there any "cause?" If there is no offense charged, are not the "proceedings void" as to every step? Also, I would cite the very case the opinion of this court rests on, as refuting the position that section 5438, Revised Statutes, refers to any such class of case as the bringing of a suit either in a constitutional or a legislative court for adjudication, judgment, or decree. U. S. v. Strobach, 48 Fed. Rep. 903. The compiler of that volume states the full force and effect of that case in the fifth syllabus as follows: "Although the act of a federal judge in passing upon the accounts of a United States marshal in open court, as required by act congress February 22, 1875, is, in a sense, the act of the court, yet, as his decision is subject to revision by the accounting officers of the treasury, it is only quasi judicial, and therefore a presentation to him is a presentation to an officer in the civil service of the United States, within the meaning of section 5438." It is "sticking in the bark"—with due respect I say it—to draw any other conclusion from that decision, and, indeed, the whole argument of the learned justice is an effort to avoid a result on demurrer which would have overturned the indictment, by showing that "open court" meant, in the statute there construed, a court in quasi judicial matters only. No one can, I venture to say, carefully read that decision, without arriving at the conclusion that Judge Woods believed that in matters judicially determined section 5438 has no application whatever. It shocks our understanding to say that one of the three coordinate branches of this government—a court created, not for the approval of claims, but to adjudicate them, and, when adjudicated, to enforce them—is "a person or officer in the civil

service" of the government. The court is itself civil service, and those who are in its service are officers and persons in the civil service; that is, in its service. This opinion being prepared on the day the majority opinion was submitted to me, then to be handed down, I am not given opportunity for more elaborate discussion of a decision which, I think, makes the most damaging precedent yet emanating from this court.

I am authorized to say that the chief justice concurs in this dissent; but the views above expressed have not been submitted to him.

[No. 554. August 28, 1895.]

PATRICK P. FORD, APPELLEE, v. SPRINGER LAND ASSOCIATION ET AL., APPELLANTS.

MECHANICS' LIENS—CONSTRUCTION OF STATUTES.—The mechanics' lien law, being remedial in its nature and equitable in its enforcement, should be liberally construed. This court held otherwise in Finane v. Hotel Co., etc., 3 N. M. 417; but the weight of authority is against that decision on this point, and it is overruled to that extent.

ID.—NOTICE OF LIEN, SUFFICIENCY OF.—Where the notice of lien and the bill of complaint follow the language of the statute, and are sustained by the proof, it is sufficient. Minor v. Marshall, 6 N. M. 195.

ID.—LIABILITY OF OWNER FOR LIEN ON LANDS APPURTENANT.—In an action by a contractor to foreclose a mechanics' lien upon a certain ditch and reservoir system, and certain lands appurtenant thereto, where it appeared his employer, by a contract with the owner, was to receive a portion of the proceeds of sale of such lands when sold at an increased value, after the construction of the ditch, and that the owner had full notice of the contract with plaintiff and that it was being executed by plaintiff as the original contractor, and it was not contended that the owner gave any notice that it would not be responsible for the work, as required by section 1529, Compiled Laws, 1884,—Held: That complainant was entitled to a lien on such land which was enhanced in value by the construction of the ditch.

ID.—OBJECTION TO NOTICE OF LIEN, TOO LATE, WHEN.—An objection to notice of lien for insufficiency in the statement of claim comes too late when made for the first time on appeal.

ID.—QUANTITY OF LAND—GOVERNMENT SURVEY—ADMISSIONS OF ANSWER—ESTOPPEL—PRESUMPTION.—In such action, where defendants admitted in their answer that the land in suit was appurtenant to the ditch and contained twenty-two thousand acres, and described the sections according to the government surveys, they were estopped to set up that the sections contained more than that number of acres. In the absence of any proof to sustain such contention, the court might presume that the discrepancy, if any, was accounted for by the deficiency in legal quantity by the statute and rules of government surveying. Moreover, in the description of land, the quantity must yield to the boundaries or number, where they do not agree.

ID.—CONTRACT—TENDER—CREDIT—EVIDENCE.—In such case, where complainant agreed to select a certain section of the land in suit and pay a certain sum for it, which was to go as a credit and payment on his contract on the final estimate, and his employers agreed to secure from the owner a deed to the same free of all incumbrances and deliver it to complainant, and there was some proof of the making of the deed by the owner, but not sufficient evidence to establish such tender, as was required by the terms of the contract, complainant was not bound to accept it and allow such credit.

ID.—FILING OF LIEN BY PRINCIPAL CONTRACTOR BEFORE SATISFACTION OF LIENS OF SUBCONTRACTORS.—Where it was contended that before the principal contractor could recover he should have satisfied the liens filed by the subcontractors, and it appeared he had not done so because appellant had not paid him according to contract,—Held: That the principal contractor was not bound to pay the subcontractors until he received his money for the work.

ID.—FORECLOSURE—DEFICIENCY JUDGMENT—PLEADING.—In a proceeding for the foreclosure of a mechanics' lien, where the bill of complaint prayed for a deficiency judgment in case the property, when sold, should not produce sufficient to fully satisfy the amount found to be due complainant,—Held: That the prayer of the bill was proper, and the court did not err in entering a deficiency judgment and order for writ of execution to issue in that event. Dodge v. Trust Co., 106 U. S. 445.

ID.—FINDING OF FACTS BY CHANCELLOR—WEIGHT OF EVIDENCE.—Where the finding of facts by the chancellor is clearly sustained by the weight of the evidence, it will not be disturbed on appeal.

APPEAL, from a decree for complainant, from the Fourth Judicial District Court, Colfax County. Affirmed.

The facts are stated in the opinion of the court.

FRANK SPRINGER, LONG & FORT, and A. A. JONES for appellants.

If the intending lienor falls short of complete and strict substantial compliance with the statutory prerequisites, he does not get his lien, but is left to his ordinary remedy against the debtor. Finane v. Hotel Co., 3 N. M. 411; Minor v. Marshall, 6 Id. 194; Phil. Mech. Liens, sec. 1. See, also, Jones on Liens, secs. 112, 1544, 1545; Canal Co. v. Gordon, 73 U. S. 571; Bottomy v. Church, 2 Cal. 90; Wagar v. Briscoe, 38 Mich. 587; 15 Am. and Eng. Ency. 5.

When the work is not done for the owner of the property, the relation which the person for whom it is done occupies to such owner must be so stated as to bring him within the list of those who, under the lien law, are authorized to bind such owner, or the lien is void. Warren v. Quade, 29 Pac. Rep. 827; Lumber & Mfg. Co. v. Wilson, Id. 829.

The omission to state the name is fatal to the lien. McDonald v. Backus, 45 Cal. 262; Wood v. Wrede, 46 Id. 637; Phelps v. M. G. M. Co., 49 Id. 336. The claim, to be of any effect, must show a prima facie lien by force of its own recitals. Jones on Liens, secs. 90, 92, 913, 1455; Noll v. Swineford, 6 Pa. St. 187, 199; Bottomy v. Church, 2 Cal. 90; Goss v. Strelitz, 54 Id. 644; 1 Greenlf. Ev., sec. 56.

The failure to deduct such just credit and offset, as the statute requires, is sufficient to vitiate the lien. Jones on Liens, secs. 1408, 1414.

If, by the terms of the contract, as in this case, the claim is not legally demandable, no lien can be founded upon it. Jones on Liens, sec. 1588; Harmans v. Ashmead, 60 Cal. 441.

WOLCOTT & VAILE for appellee.

As to sufficiency of description of land, see Phil. on Mech. Liens [2 Ed.], sec. 379; McClintock v. Rush,

63 Pa. St. 203; Kennedy v. House, 41 Id. 39; Lumber Co. v. Russell, 22 Neb. 126; De Witt v. Smith, 63 Mo. 263.

Statutes governing mechanics' liens are remedial, and must be liberally construed. Rogers v. Hotel Co., 4 Neb. 59; Lumber Co. v. Russell, 22 Id. supra; De Witt v. Smith, supra.

The assertion of quantity in a deed must yield to a description by metes and bounds, or by name and number. Stanley v. Green, 12 Cal. 148; De Arguello v. Greer, 26 Id. 632; Wadhams v. Swan, 109 Ill. 46; Ufford v. Wilkins, 33 Iowa, 110. See, also, Ware v. Johnson, 66 Mo. 662; Belden v. Seymour, 8 Conn. 18; Hatch v. Garza, 22 Texas, 177; Wright v. Wright, 34 Ala. 194; Powell v. Clark, 5 Mass. 355; Large v. Penn, 6 S. & R. 486; Doe v. Porter, 3 Ark. 57; Chandler v. McCord, 38 Me. 564; Jackson v. Livingston, 15 Johns. 470; Dale v. Smith, 1 Del. Ch. 1; Jennings v. Monk, 4 Metc. (Ky.) 106.

It is unnecessary to name the owner of the improvement, where the name of the reputed owner is stated. Sec. 1524, Comp. Laws, 1884; Minor v. Marshall, 6 N. M. 194; Harrington v. Miller, 4 Wash. 808; Allen v. Roe, 23 Pac. Rep. 901; Lumber Co. v. Gottschalk, 81 Cal. 646.

Lands appurtenant to and benefited by the ditch are here chargeable with the lien. Davis v. Auxiliary Co., 9 S. C. (Rich.) 204; Roby v. University, 36 Vt. 564; Executors v. Vandyne, 1 Hal. N. J. Eq. 490; Nelson v. Campbell, 28 Pa. St. 159.

LAUGHLIN, J.—This is an action in chancery, brought by Patrick P. Ford, appellee, against the Springer Land Association, and certain individuals corporate thereof, together with the Maxwell Land Grant Company and its trustees, to establish, fix, and foreclose a mechanics' lien upon a certain ditch and

reservoir system, rights of way therefor, and certain lands alleged to be appurtenant thereto, and it is founded on the following facts:

On October 20, 1888, a contract was entered into between Patrick P. Ford, of the first part, and the Springer Land Association, of the second part, for doing the earth work in constructing a certain ditch line and reservoir system, for irrigation, all in the county of Colfax and territory of New Mexico, the provisions of which, so far as pertinent to this case, are as follows: The party of the first part to furnish all necessary tools and labor, and perform all work of excavating and grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accord with the specifications thereto attached, and made part of the contract. * * * The party of the second part agreed to pay said party of the first part for the work so done at the rate of eleven cents per cubic yard for all earth removed, without classification; amounts due for said work to be paid at the time and in the manner described in the specifications thereto attached. "Specification 13. Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontracts will be allowed. Subcontractors will be bound by the same specifications as the original contractor, and will be equally under the authority of the engineer." "Specification 15. On or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum, retained, will be paid to the contractor, in

cash, within ten days thereafter. This retained percentage will be held by the company as a guaranty for the faithful completion of the work, and will be paid in full with the final estimate, upon the certificate of the engineer accepting and approving the work; it being expressly understood that the failure of the contractor to fulfill his obligations will mean a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon the satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness, as connected with this work."

The land upon which the ditches and reservoirs were to be and were actually located and constructed, and upon which the improvements were actually made, did not belong to the said the Springer Land Association, or to any of the parties to the contract, or to their successors in interest, so far as appears from the record, but was at the time the property of the Maxwell Land Grant Company, which was not a direct party to the contract. The Maxwell Land Grant Company did, however, make a contract on the first day of May, 1888, with C. C. Strawn and his associates, who afterwards organized the Springer Land Association, by which the Maxwell Company gave it and its associates a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was provided, among other things, that, with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises to be granted it by the other party, it agreed to set apart and reserve from sale about twenty thousand acres of its lands, and to give the other party, the Springer Land Association, which succeeded to the rights of said Strawn and his

associates under said contract, a certain portion of the proceeds which might be derived from the sale of the said lands, when sold. These lands were under the proposed ditch system, and to be irrigated by it. And by this agreement said Strawn and his associates agreed to expend about $60,000, or a sufficient sum to complete the enterprise on the proposed plan. The title to the lands at that time and at all times afterwards, so far as appears from the record, was in, and remained in, the Maxwell Company, except as to the rights acquired by Strawn and his associates and successors in interest under said contract. The same contract constituted and made Strawn and his associates and successors in interest the agent of the Maxwell Company to the extent of and for the purposes of carrying into effect the spirit and intent of the contract as to the sale of the said lands; but that party, the Springer Land Association, contracting with the appellee, Ford, had no other title in the lands than as given in that contract. Five days subsequent to the time the ditch contract was made, Ford entered into another contract with the Springer Land Association by which he agreed to select and take one section of the land under the ditch system, at the stipulated price of $8,000, to be considered as part payment on the contract price for constructing the ditch system, and the Springer Association agreed to procure a deed to Ford from the Maxwell Company, free from all incumbrances. The work of construction proceeded under the Ford contract, and he let subcontracts to McGarvey, Dargle, and Haynes. Estimates as provided by the contract, were made by E. H. Kellogg, the supervising engineer, from time to time, which were audited and paid by the Springer Association, up to about May, 1889, and the final estimates were made, including all balance alleged to be due on the contract, and for extra work, and presented about the middle of June of that year, and at the time the

contract work was alleged to have been completed, amounting to $17,634.27 due on the contract and $390 for extra work, and which the Springer Association refused to pay, on the grounds that the sum claimed was in excess of the amount due, and that the work had not been completed according to the contract; that the engineer's final estimate was erroneous in part, either through fraud, inadvertence, or mistake; and because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens. Thereupon Ford, on July 3, 1889, filed his notice of claim of lien for $17,634.27, alleged to be due on the contract, including all moneys due subcontractors at that time, and for $390, alleged to be due him for extra work. Thereafter the subcontractors filed their notice of claims of liens on the property for moneys alleged to be due them,—McGarvey for $5,000, Dargle for $2,274.30, and Haynes for an amount not shown by the record,—all of which said notices were filed within the time prescribed by law. Soon thereafter suits were brought to establish and foreclose the several liens by the subcontractors, some of which were pending when this suit was brought, and all against the ditches, laterals, reservoirs, and right of way, about sixty feet wide, the full length of the ditch, about twenty-six miles in length, and against twenty-two thousand acres of land, alleged to be under the ditch system, and to be irrigated thereby, and appurtenant thereto.

Ford filed his bill to foreclose the lien so claimed on June 30, 1890, in which he set out his contract of October 20, 1888; averred substantial compliance therewith, completion and acceptance of the same, but not by whom accepted; the filing of his claim of lien; the total amount due him at completion thereof; described the property as in the claim of lien; averred as to the contracts between the Maxwell Company,

Strawn and his associates, and the Springer Association and its associates; that, during all the time the Ford contract was being executed, the Maxwell Company and the Springer Association both had full knowledge of the same, and that neither gave any notice that they would not be responsible for it; that at the time of the completion of the work there was due Ford from the Springer Association and the individuals composing it $17,634.27 on the contract, and $390 for extra work ordered by the supervising engineer in charge,—with prayer for an accounting and foreclosure of lien, decree for payment of costs, solicitors' fees, sale of ditches, laterals, and reservoirs, and the twenty-two thousand acres of land described, and for a deficiency judgment, in case the property, when sold, should not produce sufficient funds to fully satisfy the several amounts so found to be due against the Springer Land Association and its associates. The Springer Land Association and the individuals composing it answered the bill, and denied that the work was ever completed by complainant or accepted by defendants; denied that they were indebted to the complainant for said work in any sum, or that any claim of lien was filed which would be effective to establish a lien on the ditch system, or lands described therein; averred that the Maxwell Company owned the lands, and had given the Springer Association the right to construct the ditches and reservoirs thereupon, but denied that the twenty-two thousand acres of land was to belong to the Springer Association; averred that the final estimates made by the engineer were given for work never done or completed, through fraud, negligence, mistake, or inattention, or through the fraudulent procurement of the complainant; that under the contract the right to audit and determine the amount to be paid on the engineer's estimates rested with the Springer Association, and that it was

not bound to pay on estimates as made exclusively by the engineer; that under said contract defendants were not bound to pay final estimates made by the engineer, except upon satisfactory showing that the work was free from all danger from liens or incumbrances of any kind; that subcontractors had filed liens for about $10,000 against the property, upon some of which suits had been brought, and were still pending; that complainant had failed to remove or to take steps to remove or to defend against said liens,—by reason of all of which defendants were not bound to pay the final or any other estimates for said work. These defendants filed a cross bill, setting up matters averred in the answer, and other breaches by complainant, Ford, and the loss, damages, and expenses to the defendants by reason thereof, with a prayer that, in case an accounting should be decreed under the bill, these matters should be considered and allowed as set-offs to Ford's claims, and for general relief. But neither the Maxwell Land Grant Company nor any of its trustees filed any answer or other pleadings of any kind. Complainant filed general replication to the answer and answer to cross complaint, and issue was joined on the general replication of defendants to cross answer. The cause was then referred to W. E. Gortner, Esq., as special examiner, to take proofs and report the same to the court. A vast amount of testimony was then taken, orally and by depositions, and a great number of exhibits were offered, the bulk of which was directed to the question of completion or noncompletion of the work in compliance with the terms of the contract and specifications, and the erroneous character of the final estimates by the engineer, through mistake, inadvertence, or fraud. The record here consists of over twelve hundred closely printed pages. The taking of proofs was closed and the case set down for argument, and was argued before the court in vacation, and on March

28, 1893, Chief Justice O'BRIEN rendered his decision in favor of the complainant, and made his findings of facts and conclusions of law. And a final decree was thereupon enrolled, establishing a lien on the entire ditch and reservoir system and rights of way, and on the twenty-two thousand acres of land, for $22,097.75, including interest, being the amount claimed in the notice of lien, and which included all sums due him, and due on all subcontracts; and out of this amount to pay into court a sum sufficient to satisfy subcontractor Dargle on his subcontract lien, in event that Ford did not pay the amount due to him, and file Dargle's receipt in full for same, it then appearing that Ford had settled with all other subcontractors in full; and with interest to run at six per cent from date of decree for the debt, and $1,000 for complainant's solicitors' fees, and for all costs; and for a deficiency judgment, in case the proceeds derived from the sale should not be sufficient to pay the several sums so found for complainant, against the Springer Land Association and its associates therein named; and for an order of sale and foreclosure. To all of which defendants excepted, and the case accordingly is here on appeal.

Defendants assigned errors sufficient to raise all the material issues in the cause as to its merits.

The cause was ably argued in this court, at the July, 1894, term, by Frank Springer, Long & Fort, and A. A. Jones, for appellants, and by Wolcott & Vaile, for appellee, and exhaustive briefs were submitted on both sides.

This is an action in chancery, the purpose of which is to establish and foreclose a lien in favor of the appellee on the property of the appellants, as described in the notice of lien and in the bill of complaint. And upon the notice of lien the appellee must succeed or fail; and he must show that it is in substantial compliance with all the material requirements of the law and the facts applicable to the subject.

The law providing protection to mechanics, material men, and laborers, by giving them a security on property upon which they have furnished material, labor, and skill for the enhancement of its value requires nothing unjust to the owner, and nothing unreasonable on the part of those who seek its protection in enforcing their remedy under it. Those who attempt to fix a lien and establish an incumbrance on property for the security of their just debts and demands, and thereby compel the owner to pay these obligations, which in many instances they never directly contract, must show affirmatively a substantial compliance with all the essential requirements of the statute under which they claim protection. The mechanic's lien law was unknown to and is in contravention of the common law and equity jurisprudence. It had its origin with the civil law (Canal Co. v. Gordon, 6 Wall. 561; Minor v. Marshall, 6 N. M. 195; 13 Pa. 167), yet, being remedial in its nature, and equitable in its enforcement, is to be construed liberally. The equitable object of the act is clearly expressed in the first section, in defining it: "Sec. 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." This court held in Finane v. Hotel Co., 3 N. M. 256, that the law should be construed strictly; but the weight of authorities is against it, and that decision, to that extent, is here overruled. Baldwin v. Merrick, 1 Mo. App. 281; Tuttle v. Moutford, 7 Cal. 358; Barnes v. Thompson, 2 Swan (Tenn.), 313. "Notwithstanding the mechanic's lien law was unknown to the common law, yet, in view of the equitable character of the statute, it should be liberally construed, but can not by construction be extended to cases not provided for by statute." Barnard v. McKenzie, 4 Colo. 251; 15 Am. and Eng. Ency. Law, 179, and cases there cited. But the notice of claim of

MECHANICS' liens: construction of statutes.

lien, being the foundation of the action, must contain all the essential requirements of the statute, and the failure or omission on the part of the person claiming the lien of any of the substantial requisites of the statute is fatal, and will defeat the action.

The tenth assignment of error is that the court below erred in establishing any lien whatsoever on the real estate, ditches, and reservoir system described in the decree and entered in said cause. This raised the question of validity of the notice of claim of lien. The authority for filing a claim of lien is found in section 1520, Compiled Laws 1884, and a ditch is therein enumerated as one of the various kinds of property subject to a lien; and it provides that every person who performs labor upon or furnishes materials to be used in or upon the construction, alteration, or repair of the several kinds of property therein enumerated "has a lien upon the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building, or other improvement, or his agent." And section 1522 provides that: "The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien." This section goes to the quantity of the property to be charged, and to the interest to be conveyed to and vested in, the purchaser at the foreclosure sale. Section 1524 says: "Every

NOTICE of lien: sufficiency of.

original contractor, within ninety days after the completion of his contract, and every person save the original contractor, claiming the benefit of this act, must within sixty days after the completion of any building, improvement or structure, or after the completion of the alterations or repairs thereof, or the performance of any labor in a mining claim, filed for record with the county recorder of the county in which such property or some part thereof, is situated, a claim containing a statement of his demands, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the term, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself, or some other person." This section is given in full because the lien is based upon its requirements, and must be tested by it, and on it the lien, and the action as to the validity of the notice of claim of lien, must stand or fall. It will be seen by this section that the notice of the claim of lien must contain five essential allegations or averments, and each must be stated substantially in the language of the statute. But no particular form of statement is required. All that is necessary is that the language used in the statement must convey and express in an intelligent manner the meaning and intent of the statute. To hold otherwise would be in effect, in many instances, to defeat a just and equitable claim on mere technicalities. This the legislature did not intend. The best manner in which to determine the validity of the notice of claim of lien in this case is to state each requirement of the statute and the averments in the notice of claim of lien applicable thereto; and this course will be hereinafter pursued.

The record discloses that the notice of claim of lien was seasonably filed and recorded, and that it was properly verified by the oath of the appellee, and that the action on the same was commenced within one year thereafter, and within the time prescribed by the statute. But appellants contend that none of the other requirements in this section were complied with, and that, therefore, there never was, nor is there now, any lien at all on the property as described and herein sought to be charged. This controversy can only be determined by a careful comparison of the essential requirements set out in this section with the allegations in appellee's notice of claim of lien. This section requires: First. "A claim containing a statement of his demands, after deducting all just credits and offsets." After describing the property, the notice of lien says: "To secure the payment of the sum of seventeen thousand, six hundred and thirty-four dollars and twenty-seven cents, the balance due and owing to said Patrick P. Ford by the aforesaid owner or reputed owner, after deducting all just credits and offsets, for excavating and embankments done and performed by him under a certain contract entered into by the said the Springer Land Association, a copy of which contract is hereto annexed, and made a part of this claim of lien; as, also, for the further sum of three hundred and ninety dollars, for extra excavating and hauling ordered by the engineer in charge of said ditch, and allowed him in pursuance of the provisions of the said contract,—all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past." Second. "With the name of the owner or reputed owner if known." The notice of lien says after naming the Springer Land Association, certain individuals connected therewith, the Maxwell Land Grant Company, and certain individuals as its trustees, "owners or reputed owners;" and further on it says the sum

due and owing to said Ford "by the owners or reputed owners" of the land before described, and in closing it says: "The names of the reputed owners of the land hereinbefore mentioned are the Maxwell Land Grant Company, and certain persons therein named as trustees of said company, acting under the name, style and title of the 'Board of Trustees of the Maxwell Land Grant Company.'" It is here seen that names of the owners or reputed owners of the lands are mentioned three times; and the proof shows and it is admitted by both parties that the twenty-two thousand acres of land sought to be subjected to the lien belong to the Maxwell Land Grant Company; and it is equally clear from the allegations, proofs, and admissions in the answer that the ditch system and right of way is the property of the Springer Land Association, and of the individuals composing it; and as the notice of lien and bill of complaint used the language of the statute, and is sustained by the proofs, it is sufficient. Minor v. Marshall, 27 Pac. Rep. 481; Harrington v. Miller, 4 Wash. 808; Allen v. Rowe, 23 Pac. Rep. 901. Third. "And also the name of the person by whom he was employed, or to whom he furnished materials." The notice of lien says: "Claimant was employed to do said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn, as president." It would be difficult to observe that requirement more fully than it is by this statement; and it is sufficient. Fourth. "With a statement of the terms, time given and conditions of his contract." The notice of lien avers that "the terms, time given, and conditions of said contract are those that fully appear in the copy of the said contract, which is attached hereto and made a part hereof." And, by reference to the contract and specifications filed and recorded with the notice of claim of lien as a part thereof, it will be seen that the contract provides that "said party of the first

part [appellee] agrees to begin work within ten days after signing the contract, and to complete the same on or before July 1, 1889. The party of the second part [the Springer Land Association] agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification; and the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached." By reference to the specifications it is found as follows: "(15) Estimates. On or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum, retained, will be paid to the contractor, in cash, within ten days thereafter. The retained percentage will be held by the company as a guaranty for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work; it being expressly understood that the failure of the contractor to fulfill his obligations will work a forfeiture of this retained percentage to the company. The amount due the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work." The contract for the work was signed October 26, 1888. And it here appears that the terms of the contract were eleven cents per cubic yard for all earth removed, without classification; and the time given was ten days after the signing of the contract to the first day of July, 1889. The conditions of the contract were that the contractor should perform the labor

in accordance with the contract and specifications, and that the company should pay him, at the stipulated price, from the first to about the middle of each month, in cash, for the work performed during the preceding month, less the retained percentage, which was to be paid with the final estimate, when the work was completed, on a satisfactory showing that the property was then free from all danger from liens and claims through the fault or neglect of the contractor. But appellants contend with much earnestness that it was not a sufficient compliance with the statute to give the terms, time, and conditions of the contract by simply attaching the contract and specifications to the notice of claim of lien, as a part thereof, and rely upon it as sufficient notice to the world of the contractor's claim of lien on the property sought to be charged, and that it would be too much to require persons searching the voluminous record of the notice of claim of lien, the contract and specifications in a matter of this importance. But this contention can not be maintained, because the searcher, by the notice of the lien, has his attention called to the contract as a part thereof, and the contract calls his attention to the specifications as a part of it, and on reading the entire record he is given full and ample notice of all of its conditions. This is the most satisfactory manner in which the public could possibly be advised of the notice of an intention to claim a lien and to fix an incumbrance upon the property therein described. Knabb's Appeal, 10 Pa. St. 186; McLaughlin v. Shaughnessy, 42 Miss. 520; Phil. Mech. Liens, sec. 405. Fifth. "And, also, a description of the property to be charged with the lien, sufficient for identification." The averment in the notice of claim of lien is that he, Ford, files his claim "against all that certain ditch, canal, and reservoirs commonly known as the 'Cimarron Ditch,' and its accessories,—the said ditch beginning at a point where the Ponil

and Cimarron rivers meet to form the Cimarron river, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka and Santa Fe Railroad about five miles northeast of the town of Springer, in Colfax county, territory aforesaid, being in length about twenty-six miles, and said ditch and land appurtenant thereto for right of way being of the uniform width of sixty feet,—together with all lateral ditches and reservoirs, and the land covered by and appurtenant to the same as aforesaid, as also twenty-two thousand acres of land, appurtenant to said ditch, the said land being also in said county, and under the ditch to be irrigated thereby, and described according to the townships and sections." Here follow the numbers of forty-six sections of land, according to the legal subdivisions of the government survey, and "all of which ditches, laterals, reservoirs, and lands as aforesaid are platted and laid out on the plan hereto attached and made part of this claim of lien." The same descriptions of all the property sought to be charged in the notice of lien are given and averred in the bill of complaint and in the answer and cross complaint of appellants, the Springer Land Association and the individuals composing it, and admitted as correct. There is no denial, either in the pleadings or in the proofs, that the description is in any particular erroneous. The description of the ditches, laterals, reservoirs, and right of way is amply "sufficient for identification," and to enable any one familiar with that locality to go upon, survey, and plat the same with sufficient accuracy, should it become necessary. The twenty-two thousand acres of land sought to be charged is described by legal subdivisions according to the statutes and rules prescribed for the surveys of the public lands of the United States. There is no other way in which a description of lands can be given more satisfactorily than by the legal subdivisions of the

public surveys. Such a statement must be held a specific description of the ditches, laterals, reservoirs, right of way, and of the lands, and a full compliance with all the essential requirements of the statute. After a careful consideration of all the facts, claims, statements, and demands set out in the notice of claim of lien, averments in the bill of complaint, and admissions in the answer thereto, it is found, and so held, that the notice of claim of lien is well founded, and is in full and substantial compliance with all the essential requirements of the statutes on that subject, and that it has the force and effect to, and does, subject the said ditches, laterals, reservoirs, and right of way, and the real estate thereto pertaining, as described therein, to the demands of said appellee.

LIABILITY of owner for lien on lands appurtenant.

The most difficult proposition in the whole case is the effort on the part of the appellee to subject the twenty-two thousand acres of land, not included as a part of the ditch system, to the force and effect of his lien as a security for the satisfaction of his demands in payment for his labor in constructing the ditch and reservoir system. This requires a most careful consideration of the further proposition, viz., how far a lien becomes effectual as to property beyond that upon which labor, materials, and skill have actually been expended in improvements and betterments upon a particular tract of land. Appellants contend, with much force, that the lien can not extend and attach, under any possible construction, to the twenty-two thousand acres: First, because the improvements were not put upon it; second, because it belonged to the Maxwell Land Grant Company at the time the contract was made with Ford; and, third, because there is no averment in the notice of lien or in the bill of complaint that the land was necessary as and for "a convenient space about the same, or so much as may be required for convenient

use and occupation thereof," as provided by section 1522, supra. These three propositions will be considered together. The statute applicable to the first proposition is section 1529: "Every building or other improvement mentioned in section 1520 constructed upon any lands with the knowledge of the owner, or a person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein shall within three days after he shall have obtained knowledge of the construction, alteration or repairs, or the intended construction, alterations or repairs, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement situate thereon." So much of section 1520 as applies here is as follows: "Every contractor, subcontractor * * * or other person having charge * * * of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this act." This action is purely statutory, and the purpose here in quoting in extenso from these sections is to give force and effect, in so far as possible, to the legislative intent in enacting the mechanic's lien laws, and to arrive at proper and just conclusions therefrom as applied to facts in the record. The plat of the land referred to in the notice of lien and in the pleadings as giving a description of the property sought to be charged is omitted from this record, and it is not clear from the record just what sections of the land the line of the ditch passed over; but that it does traverse some of them is very clear. Though in the construction of a ditch the improvements may be limited to the land and

the right of way, sixty feet in width and twenty-six miles in length, yet it is clearly apparent from the record that this ditch and reservoir enterprise was intended to, and did, improve and enhance the value of all the lands to be irrigated by it. In the contract made by the Maxwell Land Grant Company and the predecessors in interest of the Springer Land Association it is stated that "the party of the first part, with a view of selling at an enhanced value certain land, amounting to about twenty-two thousand acres"—the same lands here in question,—for and in consideration of certain perpetual water rights and privileges, and for a certain part of the proceeds to be derived from the sale of the lands, when sold, "agrees to and with the parties of the second part that he [the representative of the Maxwell Company] will reserve, set apart, and hold from sale, except as hereinafter provided, said twenty-two thousand acres of land under the ditch system hereafter provided;" and the parties of the second part agree to expend the sum of $60,000, or so much as might be necessary, without delay, to complete the ditch system, as a consideration for the water rights, right of way, and for their share of the proceeds from the sale of the lands when sold. Appellants, the Springer Land Association and its associates, in their cross complaint set out this contract and made it a part thereof; averred that they had sustained damages in large sums on the ground of the alleged failure of Ford to comply with the terms of his contract, and to complete the same, in that they had, at great expense, secured purchasers for the land at good prices, but that by reason of appellee's lien having been filed they could not complete the sale, and that they had, at great expense, in the spring of 1890, established a "model farm" adjacent to, and to be irrigated by, said ditch system. It is clearly apparent from all the pleadings and proofs in the record that the only object in constructing the ditch and reservoir

system was to improve and enhance the value of and render marketable the said twenty-two thousand acres of land. The appellants admit in their answer, and aver in their cross complaint, the execution of the contract, and that the Springer Land Association was the successor in interest therein. The Maxwell Land Grant Company, its trustees and agents, had full notice of the Ford contract, and had ample knowledge that the same was being executed by Ford, as the original contractor; and it is nowhere contended that it, or its agents or trustees, gave any notice that the company or its trustees would not be responsible for the work.

OBJECTION to notice of lien too late, when.

Appellants contend that the land can only be subjected to the lien by a showing that it is "required for the convenient use and occupation of the improvement," and then only "if at the commencement of the work * * * the land belonged to the person who caused said improvement or structure to be commenced;" there being no allegation in the bill of complaint that the said land was so required. The claim of lien alleges that the land is appurtenant to the ditch, "and under the ditch to be irrigated thereby, and described by sections and townships." And the bill of complaint also alleges the same fact, and this is admitted by the answer. It was so "determined by the court below on rendering its judgment," and the decree ordered the sale of so much of said twenty-two thousand acres of land as may be necessary to satisfy the demands of the appellee. This objection was raised for the first time in this court, and for that reason, if nothing else, it is not well taken. All the proofs go to show that the land is appurtenant to, and to be benefited by, the ditch. The term "so much as may be required for the convenient use and occupation thereof" means all the land benefited, and the value of which is increased or enhanced by the improvements actually made upon the

land appurtenant and adjacent thereto, and for which such improvements are made at the instance, knowledge, or consent of the owner or reputed owner thereof. A ditch requires much more land for a convenient space, use, and occupation than a house, wall, or fence, and a lien will attach for the construction of either; and no one would contend that the space would be limited to the land actually occupied by either. A lien may attach for the planting of a fruit orchard, and it could not be contended that only the space actually occupied by each tree would be subjected to the effects of the lien, but it would attach to the whole tract upon which the orchard was planted. To hold that this lien attaches only to the ditch system, twenty-six miles long and sixty feet wide, would be, in effect, to render the security for the payment of appellee's demands practically valueless, and to defeat the very spirit and intent of the law on which he had the right to rely for protection to secure payment for his labor. When the legislature enacted the mechanic's lien law it meant to provide security, and to say to the laborer, either skilled or unskilled, and to the material man, when he improves property with his skill, labor, or material, that all the property so improved in value shall be held by him as security until his demands are paid in the manner provided by the statutes. The following authorities are cited in support of this proposition: Davis v. Auxiliary Co., 9 S. C. 204; Roby v. University of Vermont, 36 Vt. 564; Vandyne v. Vanness, 1 Halstead, N. J. Eq. 485; Nelson v. Campbell, 28 Pa. St. 156. In Green v. Chandler, 54 Cal. 626, it was held that all the land was subjected to the lien, but there was no allegation in the complaint that it was necessary as a convenient space, and that the proof to that effect was not sufficient without such allegation to sustain the judgment, but it is alleged in this case in the lien claim, which is made a part of the bill of complaint, and al-

leged therein and admitted in the answer, that the land is appurtenant to the ditch. The court below found and determined, on rendering the judgment and decree, that the twenty-two thousand acres were "required for convenient use and occupation thereof;" and it is sustained by the proofs, and is sufficient, and the lien does attach to and subject the said twenty-two thousand acres to the effect thereof.

It is contended by the appellants that, even if the lien does attach and become effectual as to this land, it is excessive, because the forty-six sections described make twenty-nine thousand, four hundred and forty acres. This is on the theory that all the sections were full, and that each section contained six hunded and forty acres; but there is no proof to sustain that conclusion. Appellants admit in their answer "twenty-two thousand acres of land in said county and under said ditch, and to be irrigated thereby, and described as follows:" Then follows the sections by number, township, and ranges according to the government surveys. And they are now estopped from setting up that these sections contain more than the quantity they admitted in their answer. The description shows that about sixteen of these sections are bounded by the northern and western range lines; and Revised Statutes, United States, section 2395, provides that: "Where the exterior lines of the township which may be subdivided into sections or half sections exceed or do not extend six miles, the excess or deficiency shall be specially noted and added to or deducted from the western and northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from north to south." While the court is asked to presume that all the forty-six sections contain the legal quantity, it may, in the absence of any other proof than appears here, with equal pro-

QUANTITY of land: government survey: admissions of answer: estoppel: presumption.

priety presume that the discrepancy is accounted for by the deficiency in legal quantity by the statute and rules of government surveying. Besides, quantity in the description of land is not the governing rule as against definite descriptions by metes and bounds or by name and number. In Jackson v. Moore, 6 Cow. 706, "the conveyance purported to include two tracts of land, being townships number 3 in the fifth range, and, also, number 4 in the sixth range, to be six miles square, and containing twenty-three thousand and forty acres each, and no more; but, as these tracts were in fact six by eight miles in size, the court held that the whole passed.

"SUTHERLAND, J., in delivering the opinion, said: 'It is perfectly settled that when a piece of land is conveyed by metes and bounds, or any other certain description, all included within those bounds, or that description, will pass, whether it be more or less than the quantity stated in the deed. And where the quantity is mentioned, in addition to a description of the boundaries or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity, being the least certain part of the description, must yield to the boundaries or number, if they do not agree.'" Stanley v. Green, 12 Cal. 148. "While there may be a mistake respecting the courses and distances as to the boundaries of a tract of land, or as to the quantity of acres or leagues it contains, there can be none when its extent is defined by permanent natural monuments." De Arguello v. Greer, 26 Cal. 616; Wadhams v. Swan, 109 Ill. 46; Ufford v. Wilkins, 33 Iowa, 110. "The mention of the quantity of land conveyed may aid in defining the premises, but it can not control the rest of the description. Neither party has a remedy against the other for the excess or deficiency unless the difference is so

great as to afford a presumption of fraud." 2 Devl. Deeds, sec. 1044. And where land is described by government survey and by metes and bounds as containing a given number of acres the words as to quantity are held merely as descriptive. Hatch v. Garza, 22 Tex. 177; Belden v. Seymour, 8 Conn. 18; Wright v. Wright, 34 Ala. 194. The general rule in such cases is that, where quantity is given in a conveyance without an express covenant that the exact number of acres only shall pass, the quantity specified, being less certain, is merely descriptive, and must yield to the description as to metes and bounds by permanent monuments and numbers according to the government surveys, they being the more certain. Doe v. Porter, 3 Ark. 57; Chandler v. McCard, 38 Me. 564; Dale v. Smith, 1 Del. Ch. 1; Jennings v. Monks, 4 Metc. (Ky.) 106. But it is not quite clear just what standing the Maxwell Land Grant Company had in the court below, or in this court, for the reason that the record here discloses the fact of the acceptance of service by its attorney, and its appearance in the lower court by attorney, but it does not disclose any pleadings of any kind in its defense.

Appellants contend in their seventh assignment that the amount found for appellee in the court below is excessive, in that from the amount allowed should have been deducted $8,000 on account of land agreed to be taken by appellee under his contract made between him and the Springer Land Association on October 25, 1888. Under the provisions of that contract, Ford agreed to select one section of land, of six hundred and forty acres, under the ditch, and to pay $8,000 for it, and to let that go as a credit and as a payment on his contract on the final estimate; and the Springer Association agreed to secure from the Maxwell Company a deed for the same, free from all incumbrances, and deliver

CONTRACT: tender: credit: evidence.

it to Ford. There is some proof as to the making of the deed by the Maxwell Company, but there is not sufficient evidence to establish such a tender of it to Ford by the Springer Land Association according to the terms and conditions of the contract as the law requires, and Ford was not bound in law to accept it and deduct that sum from his demands.

It is contended in the thirteenth assignment of error that before appellee can recover he should have satisfied and removed the liens filed by the subcontractors. The record shows that the subcontractors did not file liens until the appellants refused to pay the original contractor on the final estimates; and the original contractor filed his lien first, as he had a right to do, for all the money due him, including the several amounts due the subcontractors, and that was the reason then given for the refusal of payment on the final estimates; and there was due Ford at that time, on the May estimate, over $5,000, and over $12,600 on the final estimate. There is nothing to show that Ford had not promptly paid his subcontractors out of the money received, or that he was not responsible for the money due his subcontractors. On the contrary, he said he would settle with them as soon as he was paid, and this was before any liens were filed; and the filing of Ford's lien was brought about by reason of the failure of appellant the Springer Land Association to pay him according to the terms of the contract, and they should suffer for their own laches, and not Ford. It could not be maintained that Ford should or could pay the subcontractors until he received his money for the work. To hold otherwise would be both unreasonable and unjust.

FILING of lien by principal contractor before satisfaction of liens of subcontractors.

The sixth assignment is that it was error "in providing that the decree entered in said cause should operate as a personal judgment against each of the

appellants," the Springer Land Association and its associates. There are no authorities cited in the briefs of appellants or appellee in support of or against this proposition, and we have no statute on the subject. In equitable proceedings a court of chancery will, when it is possible, afford a complete remedy; but it has been held in a state where there is no statute authorizing a deficiency judgment in foreclosure proceedings that it can not be entered. Noonan v. Braly, 2 Black (U. S.), 499; Orchard v. Hughes, 1 Wall. 73. Our statute provides as follows: "Sec. 522. The said supreme and district courts, in the exercise of chancery jurisdiction, arising under all causes and matters in equity, shall conform in their decisions, decrees and proceedings to the laws and usages peculiar to such jurisdiction in this territory, and the supreme, circuit, and district courts of the United States." By the rules of practice for the courts of equity of the United States it is provided as follows: "(92) Ordered, that in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for the balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court, regulating the equity practice, when the decree is solely for the payment of money." This rule amended rule 8, which provided, among other things, that "final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit." U. S. court rules. The bill of complaint contains a proper prayer in case of deficiency, and there was no error in the court below in entering a deficiency judgment and order for the writ of execu-

FORECLOSURE: deficiency judgment: pleading.

tion to issue in that event. Dodge v. Friedmans Savings & Trust Co., 106 U. S. 445.

Appellants contend, further, that "the amount decreed is unauthorized by the facts," on the ground that the Springer Land Association was not bound to pay simply on the estimates found by the engineer, for the reason that the amount certified by the engineer was to be "audited by the company" before payment, and that the word in specification 15 "meant to examine and adjust," and that this is a reserved power in the appellants, and that it had authority, under that reservation, to examine all statements and estimates made by the engineer before they were, under the terms of their contract and specifications, required to pay the amounts so certified, and that such estimates were not conclusive as against appellants. To maintain this contention the Springer Association would have had to send a man to examine, measure, and compute the work reported on by the engineer at the close of each month before any payments could have been made. It would require superhuman ingenuity to construe the contract and specifications to support this proposition. Such a construction is excluded by the very words and terms of the specifications. It says: "On or about the first of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay; and the amount thereof, less ten per centum, retained, will be paid to the contractor, in cash, within ten days thereafter." The words "audited by the company," as here used, meant that the company would examine and compare each estimate and the vouchers with previous estimates, vouchers, and payments allowed and made by the

company. The word "audit" is defined in the Century Dictionary as meaning "to make audit of, examine, and verify by reference to vouchers; as, an account or accounts; as, to audit the account of a treasurer." Webster defines it to "compare the charges with the vouchers." There was nothing left for the company to do but to pay on the estimates furnished by the engineer, or to refuse to do so and declare the contract void as to that condition. It refused to audit and pay the estimates and it can not now be heard to plead its own default.

Appellants contend that the court erred in its findings of facts and conclusions of law, in that they were not sustained by the proofs. As before stated, the cause was referred to a special examiner, who took and reported the testimony to the chancellor, and he arrived at his conclusions on the facts and the law from the arguments and authorities cited by counsels and the facts contained in the record; and the whole record is here for review in just the same manner that it was before the chancellor, and it becomes the duty of this court to pass upon it without reference to the findings of fact and conclusions of law in the lower court. In this it is to be distinguished from the findings of facts by a special master appointed by the court by and with the consent of all parties in interest; and this court will pass upon the whole record, and review, affirm; or reverse the decision of the court below, where the reference was to an examiner only. The master who sees the witnesses, hears them testify, and observes their manner while upon the stand is supposed to be more competent to determine and pass upon their credibility, and arrive at a correct conclusion as to the facts, than a chancellor from mere reading of the testimony; and where the chancellor sits in the case, and hears the witnesses testify orally, his find-

FINDING of facts by chancellor: weight of evidence.

ings are in the nature of the verdict of a jury, and will be so treated by the appellate tribunal, and will not be reviewed unless it is apparent from the record that such findings of facts are not sustained by a preponderance of the evidence to the same material facts in the case. There were a great many witnesses examined orally, and a vast number of depositions taken, and numerous exhibits offered on both sides; and it is impossible and impracticable in this opinion to review and rehearse the testimony found in the record. There are contradictions, criminations, and recriminations from almost the beginning to the close of the record, most of which were directed at and to the construction of reservoir number 7, on the part of appellants,—that it was not constructed in a substantial and workmanlike manner, and in accordance with the contract and specifications. The appellee offered witnesses to prove that the dam and reservior had been constructed in substantial compliance with the contract; and, while there are some contradictions to his proofs by witnesses for the appellants, it is not sufficient to overcome that of appellee, and, after a careful examination of all the evidence on this point, it is found that the work was done in substantial compliance with the contract and specifications. There seems to be little controversy as to the completion of the ditch, and the evidence shows that it was completed by Ford substantially as he agreed in his contract.

Efforts were made on the part of appellants to show that E. H. Kellogg, the supervising engineer, was during the greater part, if not all the time that the work was progressing, under the influence of Ford, and that his estimates were incorrect and fraudulent, and that he was incompetent; and to establish this, witnesses and expert engineers were put upon the stand to prove it. One engineer was brought from Chicago,

who spent some two months in "experting" the whole work for the Springer Land Association during the summer of 1889; and he reported, as the result of his investigations, descrepancies in the work, as is usually the case in the testimony of expert witnesses. He was in the employ of appellants, and did his work for them, and he was by no means a disinterested witness. As a general rule, there is no testimony so unsatisfactory or so unreliable in the every day affairs of life, or that is so misleading, or that results so disastrously to just and equitable conclusions in the homely affairs of business men as that of experts. The proofs utterly fail to establish that Kellogg was either dishonest or incompetent, or in any manner under the baneful influence of Ford or anyone else. Kellogg was the man mutually agreed upon to do the work by the Maxwell Land Grant Company and the Springer Land Association, and he was agreed upon by the Springer Land Association and Ford as supervising engineer, and placed in charge of the work; and officers and agents of the appellants were upon the ground and inspecting the work from its inception to its completion, and had ample opportunity to investigate and report any misconduct on the part of Kellogg, but there were no objections made by anyone to him until after difficulties arose between the parties. He was in constant communication with all the parties, and furnished them regular estimates from time to time, as his duties required. The perusal of the record will disclose the vast amount of work done by him, and it is found that he did it apparently with satisfaction to all concerned until after their difficulties came up, and after the work was about completed. The proofs show that Kellogg had been engaged for a great many years in constructing irrigating plants in different parts of the country, and it also shows that he gave general satisfaction in other work of a similar

character in this territory. Before a court will stamp a man as incompetent and a falsifier in his particular profession or line of business, after sustaining a good reputation as such for more than twenty years, the proofs must be positive and convincing to the contrary. A character established for competency and honesty in a profession, occupation, or a particular line of business is a thing of value to any man, and it must not be brushed aside and held for naught on mere allegations and meaningless generalities.

In the view here taken of this case it becomes unnecessary to consider any of the other assignments of errors by appellants.

After a careful consideration of all the record, it is found that the weight of evidence sustains the findings of facts by the court below, and the judgment and decree is affirmed, with directions to the lower court to make such order as will carry the same into effect.

SMITH, C. J., and COLLIER, J., concur; HAMILTON and BANTZ, JJ., not sitting.

[No. 591. August 31, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JAMES BARRETT, APPELLANT.

CRIMINAL LAW—PLEA IN ABATEMENT—PRESUMPTION.—On appeal in a criminal case, where the record does not show that a hearing was urged on a plea in abatement, the presumption is that the plea was abandoned.

ID.—PLEA OF NOT GUILTY, WITHDRAWAL OF—CHANGE OF VENUE—MOTION TO QUASH—JUDICIAL DISCRETION.—The trial court has discretionary power to refuse to permit defendant, after he has been granted a change of venue, to withdraw a plea of not guilty and substitute a motion to quash.

ID.—GRAND JURORS, OBJECTION TO QUALIFICATIONS OF, TOO LATE, WHEN. An objection to the qualifications of a grand juror comes too late on motion in arrest.

ID.—STATEMENT NOT INCORPORATED IN BILL OF EXCEPTIONS—IMPEACHMENT OF RECORD.—A statement not incorporated in a bill of exceptions can not be used to contradict the record, and will not be considered on appeal.

APPEAL from the Fifth Judicial District Court, Eddy County. Affirmed.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT, solicitor general, for the territory.

LAUGHLIN, J.—The defendant, James Barrett, was indicted by the grand jury of Eddy county, in the Fifth judicial district, at the November, 1893, term, for the crime of murder in the first degree of John Holihan, in said county, on the twenty-third day of July, 1893, and on the sixteenth day of November, 1893, was arraigned and entered his plea of not guilty as charged in the indictment; and on the next day, it being made to appear that the defendant was too poor to employ counsel, and to secure witnesses for his proper defense, the court assigned two members of the bar to defend him, and ordered compulsory process for the witnesses desired by the defendant. And the case was set down for trial on the twenty-first day of that month, and on that day defendant filed a plea in abatement under oath, alleging that two of the grand jurors who sat upon the cause and returned the indictment were not residents of Eddy county, but were at that time, and had been for six months previous thereto, residents and taxpayers of Lincoln county, but it does not appear from the plea

that defendant did not know at and prior to the time he entered his plea of not guilty to the merits, that the two grand jurors were not legally qualified to act as such. On the same day he filed his plea in abatement he also filed a motion for a change of venue in which he stated: "That your defendant only asks for a fair and impartial trial, and when he is given a county that is free from impressions as mentioned herein he is satisfied; that he suggests Lincoln county, because he thinks the people have had less opportunity to hear of this cause than those of Chaves county, and, as he has before stated herein, that is all he desires;" and the motion was granted, and the venue was changed for trial to Lincoln county. After the venue had been so changed, the defendant moved the court for leave to withdraw his plea of not guilty, and to quash the indictment, and to dismiss the case, which motion was, after argument by counsel, denied, to which ruling of the court the defendant excepted. At the March, 1894, term of the district court for said Lincoln county the case was called and set for trial for the second Tuesday of the term. On the day set for trial both parties announced themselves ready, and the trial proceeded, and after all the testimony was in, and the arguments were heard by the jury, and the case was closed, the court charged fully on the law of murder in the first degree only, and the jury, after consideration, found the defendant guilty as charged, and so returned the verdict. The defendant thereupon filed his motion in arrest of judgment, and set up that one of the grand jurors named in his first motion was not a resident of Eddy county, but was a resident of Lincoln county; and also a motion for a new trial, and another motion in arrest,—all of which motions were denied by the court, and duly excepted to by the counsel for defendant. And the court thereupon passed sentence of

death in legal form upon the defendant. From all of which rulings of the court the case is here on appeal, and it is made the duty of this court to seriously consider all the rulings of the court below material to the defendant.

The first question for consideration is as to the refusal of the trial court to allow defendant to withdraw his plea of not guilty. This was a plea to the merits of the case, and was entered some five days before he filed his plea in abatement to test the qualifications of two members of the grand jury, and the motion for leave to withdraw his plea was not presented to the court until after the defendant had secured a change of venue to another county for the trial of the case, and in his motion for change of venue he stated that that was all he desired. The record does not show that he ever urged a hearing on his plea in abatement, and, if anything is shown by the record, it is that he had no faith in his plea, and had abandoned it, and did not wish to further pursue it; and it is here presumed that he did so abandon it. This presumption is further supported from the fact appearing in the record that when he filed his motion in arrest, after the verdict, he stated that only one of the two grand jurors named in his plea of abatement was disqualified by reason of non-residence in Eddy county. If the defendant had filed his plea in abatement as to the qualifications of members of the grand jury before he entered his plea to the merits, it would have been the duty of the territory to join issue, and the court to hear and determine the issue so made. People v. Kinsey, 51 Cal. 278; People v. Fuqua, 61 Cal. 377. But the defendant did not do this. He waited until the venue of the case had been changed to another county, and the jurisdiction over the subject-matter in that

CRIMINAL law: plea in abatement: presumption.

WITHDRAWAL of plea of not guilty: change of venue: motion to quash: judicial discretion.

county had virtually ceased before he moved for leave to withdraw his plea to the merits. And he did not renew his motion for leave before trial in Lincoln county, but announced that he was ready for trial on the merits. This, then, leaves nothing but the ruling of the court on the motion to withdraw the plea, and this rested in the discretion of the court, and no circumstances are shown which would indicate that there was any abuse of that discretion. People v. Lee, 17 Cal. 76; People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347. The defendant, after verdict, filed his motion in arrest on the ground of disqualification of one of the grand jurors, but this objection came too late, as he had waived that objection by going to trial on the merits. 1 Bish., Cr. Proc., secs. 875, 886, 887; Territory v. Abeita, 1 N. M. 546; Territory v. Baker, 4 N. M. 236; Anderson v. Territory, Id. 213.

OBJECTION to qualifications of grand jurors, too late, when.

In the motion of defendant for a new trial after sentence of death had been passed upon him he sets out seven grounds, only one of which will be considered, which is the sixth: "Because the court ruled the defendant to exhaust his peremptory challenges so far as he wished in regard to the members of the general venire before a special venire was drawn." If this statement for a new trial was true, and borne out by the record in the case, it would present a different question, as under our statute (Comp. Laws, sec. 2190) it becomes the duty of the court to examine all the record of the court below, and pass upon it. In this case none of the testimony or proceedings in the court below are incorporated in the record by bill of exceptions, and we have to take the record as we find it, with all the presumptions in favor of the regularity and legality of the proceedings in the court below. This court and the supreme court of the United States have decided in

STATEMENT not incorporated in bill of exceptions: impeachment of record.

numerous cases that the overruling of a motion for a new trial is not sufficient grounds to reverse a decision in the court below. The above paragraph in the motion for a new trial is the simple statement, not under oath, of the attorneys for the defendant, while the record with reference to the impaneling of the jury, found at pages 12 and 13 of the transcript, does not anywhere show that any challenges, peremptory or otherwise, were asked or granted or refused by or against the defendant, as will be seen by the following copy of the transcript in that particular: "Now comes the territory, by her district attorney, and comes the defendant, James Barrett, in his own proper person, in the custody of the sheriff, and accompanied by counsel, and now, both parties announcing themselves ready for trial, come the following named persons, to wit [giving the names of nine], who, having been duly selected and examined and qualified as jurors for the trial of the issues joined in this cause pending, and it now appearing that there are nine duly qualified jurors aforesaid present from the trial of the issue in this cause pending; and it further appearing to the court that the regular panel of the petit jury for the present term of this court is exhausted by reason of the challenges exercised by the parties herein, and the jury for the trial of this cause not being complete, the court draws the names of twenty-four additional persons from jury box number 2, of the county of Lincoln, and doth order that a special venire issue for such persons as petit jurors, returnable on the incoming of court to-morrow evening, which is done accordingly. * * * And thereafter, on the twenty-third day of March, A. D. 1894, the following, among other, proceedings were had: 'Now, again, comes the territory, by her district attorney, and comes the defendant, James Barrett, in his own proper person in the custody of the sheriff, and accompanied by counsel, and come the nine jurors who

have been heretofore duly examined, qualified, and accepted as jurors in this cause. And now comes the sheriff and returns into court the special venire heretofore, on the twenty-first day of March, 1894, issued, for petit jurors, which shows the following named persons to have been summoned by him to appear in open court, and, being each duly examined under oath, are found to be qualified to serve as petit jurors at the present term of this court [here follows list of jurymen entered in venire]. And now the following named persons, to wit [naming three], are duly selected, examined, and qualified as jurors to complete the panel of the jury for the trial of the issues joined in this cause pending, and now the following jury, to wit [naming twelve], twelve good and lawful men taken from the county of Lincoln, having been duly selected, drawn, accepted, and impaneled, are sworn to well and truly try the issues joined in this cause pending, and a true deliverance make between the prisoner at the bar and the territory of New Mexico, and a true verdict render according to the law and the evidence.'" If the simple statement of counsel for defendant, not under oath, is to be taken in this court as contradicting the record of the cause, reversals of criminal cases in this court will only be limited by the ingenuity of counsel in framing statements of reversible error, which may only exist in his fertile brain. In this case the defendant was sentenced to death, and he had every inducement to present all the facts to this court upon which the judgment of the court below might possibly be reversed; and, if the challenges referred to in his motion for a new trial were, as a matter of fact, asked and refused, it is only reasonable to suppose that he would have incorporated the fact into this record in a bill of exceptions, and it would be here before the court for consideration in legal form. The only allusion contained in the record of this case as to challenging jurors

is as follows, found at page 13 of transcript: "And it further appearing to the court that the regular panel of the petit jury for the present term of the court is exhausted by reason of the challenges exercised by the parties herein," etc. It can not be contended that this court must assume from this language all the facts stated in the defendant's six grounds for a new trial, which contradict the record itself, as well as the presumption always made in such cases that the action of the court was regular and legal. If the defendant had incorporated his motion for a new trial in arrest of judgment and for an appeal in the bill of exceptions, and had had the same allowed and signed by the judge in the court below, and then brought the same here on appeal in proper form, this court would have been bound to consider and pass upon all errors so appearing therein; and then, if it had then appeared in the bill of exceptions so allowed and signed by the judge that the defendant had been required to exhaust all the peremptory challenges he desired out of the regular panel before another venire was issued, and when a less number than twelve men were in the box, this might be reversible error; because a defendant is not required to exercise and challenge for cause or peremptorily when a less number than a full panel of twelve men are in the jury box. If this were not the law, a defendant might be required to accept jurors out of the new panel which he would challenge if he had not been required to exhaust his right to challenges out of the regular panel, and he might be compelled to accept men to his prejudice, and thereby be deprived of a fair and impartial jury. But there is nothing to show any such state of facts in this case.

Contents of motions, papers, and affidavits filed with the clerk by counsel, and not incorporated in a bill of exceptions, and so properly brought here, can not be considered by this court, it matters not what

such contents are; and courts should not permit such papers to be filed with the clerk until the contents of the same are brought to the attention of the court; and clerks should not be permitted to copy any such papers, and certify them to this court as any part of the record. It appearing from an examination of all the record of the proceedings in the court below that the defendant had a fair and impartial trial on the merits, at a place of his own selection, the judgment of the court below is affirmed. And it appearing that the order of this court affirming the judgment of the court below can not reach the sheriff of Eddy county in sufficient time for the execution of the death sentence on the day fixed by the lower court, it is here ordered that the execution of the sentence of the court below be carried into effect on the second Friday of September, the same being the fourteenth day of September, A. D. 1894; and it is further ordered that the sheriff of Eddy county, New Mexico, execute the death sentence upon the said defendant, James Barrett, in full compliance with the order of the court below, on the said second Friday of September, the same being the fourteenth day of September, 1894; and it is so ordered.

SMITH, C. J., and FALL and COLLIER, JJ., concur.

[No. 579. October 9, 1895.]

CHARLES BENT ET AL., APPELLANTS, v. GUADALUPE MIRANDA ET AL., APPELLEES.

DECREE, INTERLOCUTORY, VACATION OF AT SUBSEQUENT TERM.—A decree establishing complainant's interest in certain land, but reserving an adjudication "as to its partition to a future term," was an interlocutory, and not a final, decree, and subject to be set aside at a subsequent term of the court, being up to that time unappealable.

ID.—SALE OF MINOR'S INTEREST IN REALTY—DISCRETIONARY POWER OF CHANCELLOR.—In such case, it was within the discretion of the chancellor to dispose, at such future term, of the interest adjudicated to the infant complainants for a money consideration, if deemed for their best interests.

ID.—SALE OF MINORS' INTEREST IN REALTY—CONSENT—JUDICIAL DISCRETION—PRESUMPTION.—The mere statement on the face of a decree that there was consent, does not operate to show that it was based on that alone, but it will be presumed that there was a reasonable exercise of discretion, by the court, in directing a sale, intended for the benefit of the minors.

APPEAL, from a decree dismissing complainant's bill, from the Fourth Judicial District Court, Colfax County. Affirmed.

The facts are stated in the opinion of the court.

CALDWELL YEAMAN, WELLS, and MCNEAL & TAYLOR for appellants.

FRANK SPRINGER for appellees.

The first decree in partition, ascertaining the moieties and directing a partition, is only an interlocutory decree. Freem. on Coten. & Par., sec. 516; 17 Am. and Eng. Ency. of Law, 749–751. See, also, 1 Freem. on Judg. [2 Ed.], sec. 32; 5 Am. and Eng. Ency. of Law, 371, 373; 17 Id. 750; Williams v. Field, 60 Am. Dec. 428–434.

Such a decree, as this was, is not final, and can not be appealed from. Freem. on Judg. [2 Ed.], secs. 29–34; Freem. on Coten. & Par., sec. 319, and citations. See, also, Perkins v. Fourniquet, 6 How. 206; 16 Id. 82; Pulliam v. Christian, 6 Id. 210; Craighead v. Wilson, 18 Id. 199; Beebe v. Russell, 19 Id. 283; Humiston v. Stainthorp, 2 Wall. 106; Green v. Fisk, 103 U. S. 518; Bostwick v. Brinkerhoff, 106 Id. 3; Grant v. Phoenix Ins. Co., Id. 429; Parsons v. Robinson, 122 Id. 112; Keystone Co. v. Martin, 132 Id. 91;

Lodge v. Twell, 135 Id. 232; McGourkey v. R. R., 146 Id. 536; Huntington v. Moore; Ivory v. Delore, 26 Mo. 506; Durham v. Durham, 34 Id. 447; Perkins v. Allen, 29 Id. 233, 236; Griffin v. Griffin, 10 Ind. 170; Cook v. Knickerbocker, 11 Id. 230; Chester v. Gibson, 15 Id. 10; Williams v. Field, 2 Wis. 421; Dickinson v. Godwise, 11 Paige, 191; Kuster v. Stark, 19 Ill. 328; Delashal v. Geiser, 36 Kan. 374; Holloway v. Holloway, 97 Mo. 628; Turpin v. Turpin, 88 Id. 337; Murray v. Yerkes, 73 Id. 13; Medford v. Harrel, 3 Hawks (N. C.), 41; Bybee v. Summers, 4 Ore. 354; Beebe v. Griffin, 6 N. Y. 464; Lee v. Henderson, 75 Tex. 190; Furman v. Furman, 12 Hun. 441.

All interlocutory orders are under the control of the court which made them until final decree, and may be revised or vacated if the court thinks proper. Fourniquet v. Perkins, supra; Gibson v. Reese, 50 Ill. 383; Gibson v. Crehore, 5 Pick. 157; Park v. Johnson, 7 Allen, 378; Davis v. Roberts, 7 Sm. & M. 543; Kelly v. Stanberry, 18 Ohio, 408; 2 Dan. Ch. Pr. 1511, note 1. And may be set aside at a term subsequent to that at which it is entered. Com. v. Beaumarchais, 3 Call. (Va.) 122; Dobbs v. Dobbs, 27 Ala. 646; Thompson v. Peebles, 6 Dana (Ky.), 387.

A decree for carrying out a settlement and compromise of a suit is not of itself erroneous. When made by consent, it is presumed to be made in view of existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree can not be impeached. Thompson v. Maxwell, 95 U. S. 400.

COLLIER, J.—For a full statement of the bill in this case, which is very lengthy, reference is made to the case of Bent v. Railway Co., 3 N. M. 227. The Maxwell company answered, denying all allegations of fact made in the bill, except what appears of record,

that the decree of September, 1866, was erroneous and void; or that the decree of June, 1865, vested in the Bent heirs a legal estate; but avers it was merely interlocutory. It avers the fairness of the alleged compromise agreement, and that the price paid was a liberal one, and denies all fraud, imposition, or error as charged. The testimony showed that the decree of June, 1865, was obtained during the lifetime of Alfred Bent, and that prior to his death negotiations for a sale of his interest and that of his two sisters, which had been declared by said decree, were pending; that subsequent to his death these negotiations were resumed, one Aloys Sheurick, the husband of one of said sisters, conducting the negotiations; that on May 3, 1866, the negotiations eventuated in a deed being executed by said sisters and their husbands and Guadalupe Bent, mother of complainants, as guardian ad litem for them, conveying, upon a consideration of $18,000, all their interests to L. B. Maxwell in the Beaubien and Miranda grant the property in controversy. There are various estimates given in the testimony as to the value of said interests, based upon a valuation per acre of the land in said grant from two and one half cents to $1.25, many witnesses saying that there was no market value whatever to such lands at that time; and there is other testimony showing that other interests in the grant were purchased from persons sui juris at a less rate than the Bent heirs obtained, and that such were ordinary business transactions at that date. Apart from the testimony to the effect that Maxwell was a man of great influence, that he was determined, resolute, and unscrupulous, that he made threats that no one should occupy any part of his land, and that people at that time had no desire to oppose any of his wishes as to anything he desired to accomplish, there is nothing from which there might be gathered any suggestion of fraud or imposition whatever. It is

shown that the solicitors advised the settlement, and that Sheurick, parting with his wife's interest on the same terms, also advised it. There is some testimony also that Maxwell misrepresented to Sheurick the extent of said grant, saying that it only went to the north boundary of New Mexico, when in fact it extended into Colorado; and it is also shown that at that time, also, the line of New Mexico was thought to extend much further north than it was afterward determined to be, and it was not made very clear whether this was a material misstatement or not. The recitals in the bill sufficiently refer to all documentary evidence necessary to an understanding of the case.

At the threshold of this case arise important questions: First. Is the decree of June, 1865, interlocutory or final? Second. If interlocutory, is it so in a limited sense as specified in the decree or upon the whole merits?

INTERLOCUTORY decree, vacation of at subsequent term.

The discussion of the question as to whether a decree is final or interlocutory in its nature arises generally, or we might say almost universally, upon motions to dismiss in appellate tribunals for alleged prematurity of appeal. It would certainly be true that, if a decree was final in the sense that it had become appealable, it would also be final in every other respect and as to all matters it adjudicates; but is the contrary true, that a decree which is not appealable because interlocutory, is interlocutory as to everything decided by it? The decisions of the supreme court of the United States upon the question of finality of decrees proceed, not only upon the theory of their being appealable or not, but also that they are direct authority (as a general rule) only upon the construction of the act of congress allowing appeals from the United States district and circuit courts from final judgments. There is, however, no special significance to be attached to this fact,

as decrees final in the same sense are appealable only in this territory, or at least such seems to be conceded by counsel for appellants and appellees; but that statement is pertinent in view of the fact that the United States supreme court will refuse to dismiss an appeal as to a decree claimed to be interlocutory solely because the supreme court of a state has held it to be appealable. Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287. As to whether a decree is final, so as to be appealable, is said by Justice BROWN in McGourkey v. Ohio Railway Co., 146 U. S. 536, to have been of more frequent discussion in that court than any other question of equity practice, and that it must be conceded that the cases are not altogether harmonious. As favoring their view that this decree is final as to the merits of the controversy even to the extent of being appealable, appellants cite Forgay v. Conrad, 6 How. 201, and the cases of Thomson v. Dean, 7 Wall. 342, and Winthrop Iron Co. v. Meeker, 109 U. S. 180, in which the doctrine laid down in Forgay v. Conrad, supra, is expressly reaffirmed. Other cases speak of the case of Forgay v. Conrad being exceptional, some saying that the peculiar circumstances and the certainty of irremediable injury ensuing if an appeal could not be taken from a decision in which the whole question had been adjudicated, because of there being a reference to a master in which further action must be taken by the court in the matter of an account, should have made it appealable, and some that it was only sustainable upon the theory of execution being awarded. The other line of decisions which appellees have cited to sustain their contention that this is an interlocutory decree begins, strange to say, with the case of Perkins v. Fourniquet, 6 How. 206, which immediately succeeds Forgay v. Conrad, supra; the opinions in both cases being from the pen of TANEY, C. J. While, in some respects, the decree in Perkins v. Fourniquet more resembles the

one at bar than does that in Forgay v. Conrad, there is a similarity in the decree here and in Forgay v. Conrad, in the fact that in both the decree recites that the bill is retained for a limited purpose,—here as to the partition, and there as to the adjusting of accounts. The dissimilarity in this respect from the decree in Perkins v. Fourniquet is marked, in that in it all matters "are reserved until the incoming of the master's report." In Pulliam v. Christian, 6 How. 209, next succeeding Perkins v. Fourniquet, it was held that a decree setting aside a deed and ordering the property delivered to a commissioner of the court to take an account, and "report all matters necessary to a final decree," was "final only as to the trust deed," but, not being final as to the whole matter in controversy, the appeal was dismissed. Other cases, beginning with Craighead v. Wilson, 8 How. 201, say, "that, to authorize an appeal, a decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit." These citations represent quite completely the positions arising in discussions as to whether or not a decree is final, so as to be appealable. Tested by the rule stated in Craighead v. Wilson, supra, it would seem that this decree was not final, so as to be appealable, because the pleadings certainly embraced two matters,—one, the establishing of the interest claimed; and the other, the partition sought by the bill. The bill in Perkins v. Fourniquet, as it sought the establishment of a certain interest in real estate and partition, is very like the case at bar. We think it would be a profitless task to enter upon a discussion to reconcile cases which later decisions of the United States supreme court say are not entirely harmonious, but we hold that the decree of June, 1865, was not final so far as to be appealable, thus following what we conceive to be the rule in Craighead v. Wilson, supra.

There recurs, then, the question as to whether it was final in the sense that it could not be vacated in the court where rendered, after the term at which it was rendered; the decree reciting on its face that "the court now reserves and suspends making its decree as to the partition and payment of the costs until a future term of this court." Upon this point, appellee again cites Perkins v. Fourniquet, supra, as later reported in 16 How. 82. In the first decision, Chief Justice TANEY, delivering the opinion there, said that "these interlocutory orders and decrees remain under control of the circuit court, and subject to their revision;" and the circuit court did at a subsequent term in fact reconsider its opinion, and, finding that there was no equity in the bill, dismissed same, it formerly holding precisely to the contrary; and in 16 How. 82 (TANEY, C. J., again rendering the opinion), this was held to be proper, and that, if the court discovered itself to be in error, it had the right to correct the error. This case certainly seems to establish the principle counsel for appellees contend for. It is true that the first decree decided to be interlocutory did in terms say that all matters "are reserved until the incoming of the master's report;" but that clause did not appear to weigh in the mind of the court, but the right appears to be proclaimed that, prior to the time the right to take appeal began, the case should be rightly decided upon all issues, notwithstanding a prior erroneous adjudication. There are expressions in the opinions of the court in other cases which appear to militate against this view; as, for instance, in Pulliam v. Christian, 6 How. 209, the court say this decree "is final only as to the trust deed," but, not being final as to the whole matter in controversy, "is not appealable." In Beebe v. Russell, 17 How. 283, the court say, in discussing Forgay v. Conrad, supra, that it was "doubtful if the lower court could in any way control or qualify its an-

tecedent decree upon the whole merits, except upon a petition for a rehearing." These chance expressions should not, it appears to us, weigh against the effect of the decision in 16 How. 82, supra, and we therefore hold that the decree was interlocutory, and subject to be set aside at a future term of the court, merely because it was up to that time not appealable.

This brings us to the contention of counsel for appellants that, the decree of September, 1866, showing upon its face that the consent upon which it was based was not a legal consent so far as these complainants are concerned, it was merely a modification of the prior decree pro tanto; that is to say, so far as the adult complainants were interested, it was entirely abrogated, and, so far as the infants were affected, it dismissed only the partition part of the former decree, if even it did that much.

The position taken by appellants' counsel in their brief that "every presumption of law is in favor of the validity of a judgment by a court of competent jurisdiction, and the jurisdiction to render a particular judgment is supported by like presumption, except when the want of jurisdiction appears on the face of the record," and for which they cite a number of cases, we believe to be well founded in law.

We come, then, to the point as to whether or not the recital in the decree of September, 1866, of consent, as affecting these complainants (they being minors, and represented by their mother as guardian ad litem), of itself invalidates the decree of September, 1866. Our holding that the decree of June, 1865, was merely an interlocutory decree, and subject to revision at a subsequent term of the district court, carries the conclusion that the suit in which they were complainants was at the time of the September, 1866, decree, a suit pending, with

SALE of minors' interest in realty: discretion of chancellor.

nothing in it that was res adjudicata. Appellees claim that, under such circumstances, it was open to compromise, and that also the interest claimed, whatever might be said as to the effect of a final decree establishing it, was then, at all events, merely an equitable estate. Taking these propositions in inverse order, we think it is manifest that, prior to final decree, the legal estate was in Beaubien and Miranda, the grantees of the Mexican government, and that, prior to final decree establishing their interest, complainants had nothing more (if anything) than an equitable estate. As clearly stated in Cochran v. Van Surlay, 20 Wend. 376: "It is a settled principle that, whenever the property of infants consists of real or personal estate the legal title to which is in trustees, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof as he, in the exercise of a sound legal discretion, may deem most beneficial for the infants." In Wood v. Mather, 38 Barb. 473, and Anderson v. Mather, 44 N. Y. 260, it is said that, upon principle and authority, a court of chancery has power to sell equitable interests of infants, and that such power is inherent and independent of statutory authority. We hold, therefore, that the interest of these complainants being at the date of the September, 1866, decree, an interest claimed in a pending suit, equitable in its nature, and sought to be established according to the contention of appellants' counsel, as a legal estate, and the decree adjudicating it not being yet final, but interlocutory, and under the control of the court, there was legal discretion and jurisdiction in the district court to dispose of it for a money consideration, if deemed for the best interests of the infant complainants. Shall it then be said that, because the decree professes as its basis "consent" when the complainants were not sui juris, vitiates it when, if the consent had not been

SALE: consent: judicial discretion: presumption.

stated, the decree would be upheld by every presumption of law and fact? We think not, but that a fair construction would be that the court considered it beneficial to the interests of these minor complainants, and for that reason the decree was entered, and the recital of the consent and agreement were merely incidents of the transaction; the law finding a basis for the decree in the discretion of the chancellor exerted in the infants' behalf. It is stated in Kingsbury v. Buckner, 134 U. S. 680, that a guardian ad litem can not bargain away the rights of the infant he represents, but he can assent to such arrangements as will facilitate the determination of a suit. It is also said that it is the duty of the court to protect the interests of infants, and see that they are not bargained away by those assuming to represent them. In Taylor v. Franklin Savings Bank, 50 Fed. 289, it is stated to be well settled that "infants can, by an original bill in the nature of a bill for review, attack any decree entered against them during their infancy, and have it set aside for fraud or error in fact." This case is essentially like the case at bar in one respect, viz., the decree was entered upon a settlement and compromise made between a foreclosing bank and the guardian ad litem of infant defendants; and the court say: "It may be, and probably is, true that, so long as this decree is allowed to stand, it is binding by its terms on the infant defendants." And then, after announcing as above the rights of attack by them for fraud or error of fact, the decree was held to be successfully impeached for fraud, and was set aside. There was no pretense in that case that the settlement and compromise by the guardian ad litem vitiated of itself the decree, but it must have been taken by the court as advisory, and was held unauthorized and inequitable, because of the suppression of facts known to the plaintiff. We hold, therefore, that the mere statement on the face of the decree that there was consent does

not operate to show it was based on that alone, and that it will be presumed there was a reasonable exercise of discretion intended for the benefit of said minors. The United States supreme court, in Thompson v. Maxwell, 95 U. S. 398, has said that this "decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous. When made by consent, it is presumed to be made in view of existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree can not be impeached."

Thus, we are brought to the question as to whether there was fraud in obtaining the decree. We do not enter into a discussion at large of the testimony by which it is claimed that the decree of September, 1866, is successfully impeached upon the ground of fraud; and while we are not prepared, in view of testimony submitted since the decision in Thompson v. Maxwell, 95 U. S. 400, to say that "the proofs show a case which, in our judgment, supports the conclusions of the decree to the effect that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf," we do hold that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion, and that no fraud, imposition or error has been shown to have entered into said transaction, or to have brought about said compromise decree.

It is claimed by appellants that there has been a decision of this court (Bent v. Maxwell L. G. & Railway Co., 3 N. M. 227), which is the law of the case, and that in and by said decision it was held that the decree of June, 1865, vested in Alfred Bent a legal estate, which descended to complainants, which legal estate

there was no authority in the chancellor to dispose of by sale, as and by the decree of September, 1866. From a careful reading of the bill filed in this cause, it does not appear that this portion of the opinion delivered by the court in Bent v. Maxwell L. G. & Railway Co. was at all necessary to the disposition of the demurrer which had been interposed. Indeed, following upon the announcement of the court that the bill states "facts sufficient to warrant the interference of a court of equity in their behalf, and that, under the authorities cited, they have properly brought their bill in the form of an original bill to impeach the decree complained of on the grounds of fraud, imposition, and error," BELL, A. J., arguendo, states what is relied on by appellants' counsel as determining the law of the case; viz., that this was a legal estate, established by the decree of June, 1865, and the district court had no authority to order its sale. This announcement was essentially dictum, and, if correct as stating abstract principles of law, has, in our view, no application to this case; the decree of June, 1865, not being final, but interlocutory, and the equitable interest of Alfred Bent not having been conclusively established by a final decree in the district court.

Other questions, around which has been thrown a wealth of learning and research, such as befits the ability of counsel engaged, and the magnitude of the interests involved, we deem it unnecessary to advert to, as the views we have expressed are sufficient for a disposition of the cause adversely to appellants. It is the opinion of the court that the decree of the district court in and for the county of Colfax dismissing said bill of complaint ought to be affirmed, and it is accordingly so ordered. It is further ordered that this cause be remanded to said lower court, with directions to carry said decree into effect.

LAUGHLIN, HAMILTON, and BANTZ, JJ., concur.

[No. 581. October 9, 1895.]

MAXWELL LAND GRANT & RAILWAY COMPANY ET AL., APPELLEES, v. GUADALUPE THOMPSON, ADMINISTRATRIX, ET AL., APPELLANTS.

AFFIRMED upon same state of facts and conclusions reached in Bent et al. v. Miranda et al., p. 78, ante.

APPEAL, from a decree for complainants, from the Fourth Judicial District Court, Colfax County.

CALDWELL YEAMAN, WELLS, and MCNEAL & TAYLOR for appellants.

FRANK SPRINGER for appellees.

COLLIER, J.—The history of events which preceded the filing of the bill in this case is minutely set forth in the opinion of Justice BRADLEY in the case of Thompson v. Maxwell, reported in 95 U. S. 391, and the purpose of the filing of the bill upon which the proceedings were had that were then before the supreme court of the United States on appeal. The bill then before that court, being a bill of review, was held not to be sustainable, as such a bill could not be used to reverse, modify, and reconstruct the decree of September, 1866. That court held, however, that "if, instead of seeking to reverse the decree of September, 1866, the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections, and equally conducive to the object in view,—the quieting of the title to the land in question." That court, therefore, reversed the decree on that bill, which had been in favor of the complain-

ants in the lower courts, with directions to allow them to amend their bill as they should be advised, and with liberty to the defendants to answer any new matter introduced therein, and that all the proofs in the case shall stand as proofs upon any future hearing, with liberty to either party to take additional proofs, etc. An amended bill was then filed, which, by elimination, changed it from a bill of review to a bill to quiet in complainants the title to the property in controversy. Upon the answer, practically the same questions are raised as in the case of Bent v. Miranda (decided at this term), the evidence in each case being used in both, as per stipulation of counsel, who were the same in both causes. A decision against the appellants, who were complainants in that cause, must logically conduce to an affirmance of the decree rendered in favor of the complainants in this cause, and it is so ordered. It is further ordered that this cause be remanded to the district court of Colfax county, with directions to carry said decree into effect.

LAUGHLIN, HAMILTON, and BANTZ, JJ., concur.

[No. 624. October 10, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. BRIGIDA SISNEROS DE GUTMAN, APPELLANT.

CRIMINAL LAW—CONFLICT OF TESTIMONY—VERDICT.—A verdict of conviction on conflicting testimony will not be disturbed on appeal.

ID.—LARCENY—INSTRUCTION.—An instruction that if a theft was committed, and the jury found the opportunity was such as to point to the defendant as the sole perpetrator, or as the perpetrator with others with whom she acted in concert, they might find her guilty, was a proper instruction.

ID.—INSTRUCTION.—An instruction asked covered by instructions previously given, was properly refused.

ID.—CONSPIRACY—EVIDENCE.—Complicity in crime may be shown by evidence other than that which is direct and positive.

ID.—WITNESS—TESTIMONY OF CHILD TEN YEARS OF AGE—WEIGHT OF TESTIMONY—JURY QUESTION.—The admission of the testimony of a child ten years of age was not an abuse of judicial discretion, where it was disclosed upon examination on the voir dire that the child was technically qualified; and the weight of his testimony was a question for the jury.

ID.—WITNESS—ADMISSIBILITY OF TESTIMONY OF ACCUSED AS AFFECTING CREDIBILITY.—A defendant offering to testify is subject to cross-examination the same as any other witness; and it was not improper to draw from such witness the fact that she had for some time sustained illicit relations with one to whom she was not married. The act, though tending to degrade her, was admissible as affecting her credibility.

APPEAL from a judgment of the Second Judicial District Court, Bernalillo County, convicting defendant of larceny. Affirmed.

The facts are stated in the opinion of the court.

BERNARD S. RODEY for appellant.

Evidence of theft which is merely circumstantial in character, and showing only that defendant had opportunity to have committed the crime, unless the opportunity was sole and exclusive as to defendant, is quite as consistent with the innocence of the accused as with guilt, and does not overcome the legal presumption of innocence, to the benefit of which every person accused of crime is entitled. Reveal v. State, 10 S. W. Rep. (Tex.) 759; Kaiser v. State, 53 N. W. Rep. (Neb.) 610; Walbridge v. State, 13 Id. (Neb.) 209; Bradshaw v. State, 22 Id. (Neb.) 361; People v. Lesser, 27 N. Y. Sup. 750; People v. Gillette, 28 Id. 101; State v. Bridges, 19 S. E. Rep. (N. C.) 607; Bishop v. State, 25 S. W. Rep. 25; State v. Payne, 34 Pac. Rep. 317; Wood v. State, 24 S. W. Rep. 99.

The admission of the testimony of a mere child, who admitted that his mother, the prosecutrix, told

him what to testify to, was an abuse of judicial discretion. Rapal. Law Wit., secs. 7, 69; 1 Greenlf. Ev., sec. 367.

The admission of evidence as to the private character of defendant by cross-examination, over her protest, when such evidence was not material, nor cross-examination at the time, her character not being in issue in that sense, was error. Martin v. State, 16 S. Rep. 82.

The court also erred in instructing as to a conspiracy when there was no evidence to sustain the same, and the instructions as a whole amounted to a comment on the weight of the evidence, where they stated that there was evidence tending to show the possession by the defendant of some of the stolen property. U. S. v. Candles, 65 Fed. Rep. 303.

JOHN P. VICTORY, solicitor general, for the territory.

The jury being the judges of the weight and credibility of the testimony, and the general verdict being supported by the evidence, a new trial will not be granted. Territory v. Webb, 2 N. M. 154; Territory v. O'Donnell, 4 Id. 212; Territory v. Hicks, 6 Id. at 609; Territory v. Trujillo, 7 Id. at 47.

The court properly ruled, after a preliminary examination touching his qualifications, that the child Juan Baca y Serna was a competent witness. Bish. Crim. Proc., sec. 1144.

The prosecution had a legal right to cross-examine appellant upon matters not relevant to the issue when the questions asked were intended to shake her credit by injuring her character. 7 Am. and Eng. Ency. Law, 109; Phil. on Ev., secs. 503, 504.

A portion of the money having been found on defendant, the jury had a right to infer, from accompany-

ing circumstances, that she stole the whole amount. Commonwealth v. Montgomery, 11 Metc. (Mass.) 534.

The contention of appellant that the court, of its own motion, improperly instructed the jury in stating the personal opinion of the court, is too general for consideration by this court; and it does not appear that such objection was made below as would justify an assignment of error thereon in this court. 4 N. M. 208.

Even if the instructions were open to the objection claimed, it is very doubtful if section 2055, Compiled Laws, 1884, applies to criminal cases. Territory v. Franklin, 2 N. M. 307; Territory v. Romine, 1 Id. 114; Territory v. Faulkner, 6 Id. 464; Territory v. Trujillo, 7 Id. 43.

All persons who counsel, aid, abet or advise a larceny are principals and equally guilty with those who actually commit the offense, and even though they be not actually present at the time the property is taken. Hogsett v. State, 40 Miss. 522; State v. Gaston, 73 N. C. 93; Com. v. Lucas, 84 Mass. 169; Taylor v. State, 5 Tex. App. 529; People v. McMurray, 4 Park. Crim. (N. Y.) 234; Watson v. State, 21 Tex. App. 598.

BANTZ, J.—The defendant was indicted, tried, and convicted in Bernalillo county for the larceny of certain money and other property; and, after unsuccessfully moving for a new trial and in arrest, she appealed to this court, assigned some fourteen grounds of error, but the main point contended for is that the evidence of itself and in itself is insufficient in law to warrant the conviction. We have carefully read and considered the evidence, and think it fully and sufficiently sustains the verdict. The jury passed upon the conflicting testimony, and determined where the weight and credit lay. Their verdict can not be disturbed in such case on appeal. Territory

CONFLICT of testimony: verdict.

v. Webb, 2 N. M. 154; Territory v. Trujillo, 7 Id. 43.

The third instruction asked by defendant was properly refused by the court. If the only evidence of defendant's guilt had consisted in proof that defendant had the opportunity to commit the crime, then it may be true that the burden would be upon the prosecution to show that such opportunity was sole and exclusive. But there was evidence in this case tending to show that the defendant gave the prosecutrix, Mrs. Baca, drugged wine; that the defendant, her sister Adela, and one Aragon were afterward seen together, several times during the day, going in and out of Baca's house; that, when Mr. Baca came home, he found his wife lying on the bed insensible, defendant sitting on the bed by her side, and Aragon also in the room; that the key to the trunk from which the money and property were stolen was found where the defendant had been sitting; the defendant and Aragon then left the house together. Papers from the trunk lying on the floor attracted Baca's attention. The loss of the money from the trunk was discovered, and in an hour or two Baca found the defendant with Aragon at the house of a neighbor; the defendant then admitting having given the wine to Mrs. Baca, and that she had got $1.25 from her as a loan. This loan Mrs. Baca denied having made. Baca, a policeman, and the defendant went to Adela's house. The latter, upon being confronted, admitted that they had opened the trunk, when the defendant exclaimed to her: "What are you doing? Don't give yourself up. Let them accuse us. They can get nothing out of us." A beaded belt, part of the missing property, was afterward recovered from Aragon, who has since disappeared. Adela was jointly indicted with the defendant, but defendant secured a severance. The defendant attempted to show that she was not at Baca's house from

9 o'clock A. M. until evening, but in this she was flatly contradicted by several witnesses. Her testimony as to the circumstances under which she claimed to have borrowed the money tended to show it to be false. Her attempt to show that Mrs. Baca was drunk from wine obtained later in the day was also opposed by other testimony. The saloon keeper who it was alleged sold the wine testified to only one sale; that was to Aragon, at about 7 A. M., before defendant visited Mrs. Baca, and not at 9 A. M., when she claimed Aragon got the wine the second time.

The third instruction to which we have alluded entirely ignored the main proposition upon which the prosecution relied; namely, that the defendant acted in concert with her sister and Aragon in the theft. But the court correctly instructed the jury in substance that if a theft was committed, and the opportunity was such as to point to the defendant as the sole perpetrator, or as the perpetrator with others with whom she acted in concert, then they might find her guilty.

LARCENY: instruction.

The second instruction refused, as to reconciling the testimony consistently with innocence, was covered in even stronger terms by the instruction given.

INSTRUCTION.

The objection to the charge of the court as to complicity is not well taken. Concerted action between parties in the commission of a crime need not be shown by direct or positive testimony.

CONSPIRACY: evidence.

The alleged comment upon the evidence was not harmful and did not assume that the evidence established any fact, nor did it give undue prominence to any of the proof.

Permitting the child ten years old to testify was not an abuse of discretion. The record upon the voir dire discloses that he was technically qualified, and his

TESTIMONY of child ten years of age: weight of testimony: jury question.

answers both then and afterward were unusually bright and intelligent. The weight of his testimony was for the jury. There is no precise age at which a child's evidence is absolutely excluded. At the age of fourteen and over there is a presumption of sufficient discretion and understanding until the contrary appears. Under that age there is no such presumption, but the inquiry is first made as to the degree of understanding possessed; and if it then appears that the child has sufficient natural intelligence, and understands the nature and effect of an oath, he is admitted to testify, whatever his age may be. 1 Greenl. Ev., sec. 367. Such an examination was made by the court below.

The defendant offered herself as a witness, and was therefore subject to cross-examination the same as any other witness; and it was not improper to draw from her the fact that for nine years she had been cohabiting with one with whom she was not married. The act was recent and continuous during a long period of time, and, though tending to degrade her, was admissible as affecting her credibility. 1 Greenl. Ev., sec. 454, et seq. If the matter tended to criminate her, she might have declined to answer; but no such ground of objection was urged, even if such ground could be assigned by counsel instead of the witness herself. Id., sec. 451.

ADMISSIBILITY of testimony of accused as affecting credibility.

The assignment of error based upon the alleged variance as to ownership is not supported by the record. The court's instruction was sustained by the evidence, and followed the very terms as to ownership laid in the indictment. There was no error in the record, and the judgment is affirmed.

LAUGHLIN and HAMILTON, JJ., concur.

[No. 623. October 10, 1895.]

UNITED STATES OF AMERICA, APPELLEES, v. ALBERTO BIENA, APPELLANT.

CRIMINAL LAW—SELLING LIQUOR TO INDIANS—NEW TRIAL.—Where, on a conviction of defendant for selling liquor to Indians, a witness for the prosecution, who had testified that he had seen defendant sell whisky to an Indian, confessed that he had sworn falsely, but there were two other witnesses who testified to defendant's guilt, a new trial was properly refused.

ID.—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF VERDICT BY JUROR—NEW TRIAL.—An affidavit by a juror, that some of the jurors had stated during their deliberations that a witness, who afterward confessed to perjury, was reliable, and that defendant was convicted on such statements, was no ground for new trial, where there was nothing to show that any of the jurors based their verdict solely on the testimony of such witness, or that such statements caused any of them to change their votes from acquittal to guilty, and there was other testimony to facts sufficient to establish defendant's guilt.

ID.—NEW TRIAL—JUDICIAL DISCRETION.—The granting or refusing of a new trial rests in the sound discretion of the trial court, and will not be reversed on appeal, unless it clearly appears that such discretion has been grossly abused.

APPEAL from a judgment of the Second Judicial District Court, convicting defendant of selling liquor to Indians. Affirmed.

The facts are stated in the opinion of the court.

BERNARD S. RODEY for appellant.

J. B. H. HEMINGWAY, district attorney, for the United States.

LAUGHLIN, J.—The appellant was indicted by the United States grand jury for the Second judicial district, at the March, 1894, term of said court, on the charge of selling liquor to Indians under charge of an

Indian agent of the United States, and was tried and convicted at the March, 1895, term of said court, and sentenced to imprisonment in the New Mexico penitentiary for the term of one year, and to pay a fine of $1 and costs. The appellant moved for a new trial, and his motion was argued three times, and was passed upon and denied by both Judge HAMILTON and Judge COLLIER, and from their rulings the cause is here on appeal.

SELLING liquor to Indians: new trial.

The appellant assigned as the eighth ground of error for a new trial, and upon which this court is urged to reverse the court below, as follows, viz., "Because one of the principal witnesses for the prosecution * * * has, since the trial, confessed his perjury before a United States commissioner, and that, according to the affidavit of one of the jurors, his was the testimony relied on for conviction." The record discloses that one Jose Antonio Lobato was a material witness for the prosecution, and that after the trial and conviction, and pending the motion for a new trial, he went before a United States court commissioner and stated that the testimony he had given on the trial against the appellant was false, and that he had never seen appellant sell liquor to Indians at any time, and on his confession he was at the same term of court indicted for perjury, and was taken before the court, and again confessed, and was by the court sentenced to imprisonment in the New Mexico penitentiary for the term of two years.

Appellant filed in support of his motion for a new trial on the ground of newly discovered evidence an affidavit of one G. L. Altheimer, who was one of the jurors who returned a verdict of guilty, in which said Altheimer swore that some members of the jury made a statement during their deliberations to the effect that said Lobato was a truthful and reliable witness, and, upon such statement being made, several of the other

jurors changed their votes from acquittal to conviction, and that said Lobato's testimony was much relied on by some of the members of the jury; but that he, said Altheimer, did not regard said Lobato as a truthful witness, and did not rely on the statements made by others of the jurors as to the truthfulness of said Lobato, and that he voted for conviction, rather than remain in the jury room longer, or during the night, as he claimed he was not well at that time, and that he so voted for conviction on the theory that the majority might be right. Counsel for appellee admits that the subsequent confession of perjury by said Lobato, followed by his conviction and sentence, destroyed completely his testimony, and that it should be eliminated from the record; but he contends that if sufficient legal testimony remains in the record, given by other competent witnesses, to sustain a verdict, the judgment should be affirmed. This proposition is admitted by counsel for appellant. This leaves for determination by this court the fact whether or not there is in the record sufficient legal evidence to sustain the verdict after the elimination of all of said Lobato's testimony, and the further consideration of the admissibility and effect of said Altheimer's affidavit. Lobato testified that he saw appellant deliver whisky to a Navajo Indian on the eighteenth day of February, 1894, at La Posta, in Bernalillo county; but this testimony is eliminated, and is here given for the purpose of distinguishing it from the other dates testified to by other witnesses. Witness Vicente Torres testifies positively that he saw appellant deliver a keg and bottle to Indians between 6 and 7 o'clock on the twenty-third day of December, 1893, at La Posta, his place of business; and that the keg and bottle were filled from a barrel in which appellant kept whisky; and that he (witness) had drank whisky drawn from the same barrel. This testimony was substantially corroborated by witness Meliton Cordova. Another witness for the prosecution

—Gaudalupe Jaramillo—testified positively that he went to the store of appellant to purchase a bag of flour some time during the year of 1893, and that he saw appellant deliver a gallon of whisky to two Navajo Indians; but he did not give the date in that year, and his testimony is not corroborated by any other witness. Here are two separate and distinct offenses established by legal evidence, either of which would be sufficient to support a verdict; and Lobato's testimony, even if believed by the jury, established a third offense, and was only cumulative evidence—that is, it is evidence of the same kind, and to the same point, except as to date,—but it goes to establish a conviction on the same charge. It is a well settled principle of law that a new trial will not be granted on the ground of newly discovered evidence where it appears that such newly discovered evidence is only cumulative (Territory v. Yarberry, 2 N. M. 391), and not then until it shall be made to appear that, if a new trial should be granted, the newly discovered evidence would probably produce a different result on the new trial from that arrived at on the first trial (Ruhe v. Abren, 1 N. M. 247; 16 Am. and Eng. Ency. of Law, 575; Lamy v. Remuson, 2 N. M. 245). It is perfectly clear from the record in this case that if a new trial should be granted, and the same evidence, after excluding that of Lobato, were placed before a jury, it would be amply sufficient to justify a verdict of guilty; and courts never grant a new trial where it is apparent from the record that the result would probably be the same.

NEWLY discovered evidence: impeachment of verdict by juror: new trial.

The next question for consideration is the conduct of the jury as set out in Altheimer's affidavit, and its effect in impeaching the verdict of the jury of which he was a member. The general rule is that testimony of jurors can not be received to impeach their own verdict, but there are exceptions to the rule. Mattox v. U. S., 13 Sup. Ct. 50, and cases there cited. But

in Altheimer's affidavit there is nothing to show that any of the jurors based their verdict solely on the testimony of Lobato, or that the statement made by some of them to the effect that they knew him personally, and that he was a truthful and reliable person, caused any of them to change their votes from acquittal to guilty; and to warrant a reversal on this ground it must plainly appear from the affidavit that the statements made by the jurors had at least some influence on those of the jury who had previously favored acquittal, and caused them to change their votes for conviction. It is true that the affidavit says that "by virtue of such statements several of said jurors at once changed their votes from being in favor of defendant to a vote for his conviction" but this is a mere declaration on the part of the affiant, prepared, no doubt, for him to sign and swear to, and does not carry with it such weight as to lead to the conclusion that such statements did have the effect to change the minds of the jurors. Altheimer says the statements had no influence over his mind, and he does not show how the statements had any influence on the minds of other jurors, and it is not shown in the affidavit that any of the jurors disbelieved any of the other witnesses who had testified to other material and distinct issues in the case. If it was error in admitting the affidavit in support of the motion for a new trial, it was in favor of, and not against, the interest of appellant, and this error assigned is unavailing.

Courts should look upon affidavits of jurors seeking to impeach their own verdicts with much suspicion, and admit them with great caution. After trial and conviction it is not usually very difficult to obtain an affidavit from some of the jurors to some misconduct on the part of some of the other jurors, or some technical defect in their deliberations; and if appellate courts were to grant new trials on such affidavits, unless it is made to appear plainly that substantial

justice had not been done, there would be few convictions, and in numerous instances crime would go unwhipped of justice. It would be an abuse of time, and a dangerous precedent, to encourage jurors in filing affidavits to impeach their own solemn verdicts, and in many instances it would render the proceedings in trial courts a mere farce.

Strong efforts were made and an unusual quantity of energy expended in this case on the part of the appellant to impeach the witnesses for the prosecution, as to their truth and veracity, and to break down and destroy their testimony before the jury, all of which efforts seem to have failed, as is generally the case in such instances, for it will not be presumed that the jury believed Lobato, and did not believe all the other witnesses who testified for the prosecution positively to separate and distinct facts. The proofs show that appellant did keep and sell liquors, and that he sold and delivered liquors in small kegs and bottles to his customers, and that Navajo Indians were frequently seen drinking and drunk in the immediate vicinity of his place of business, and these were simply corroborative circumstances in support of the other facts testified to by the witnesses; and under our system the jury are the sole judges of the credibility of the witnesses and the weight to be given their testimony, and where they pass on disputed facts their verdict will not be disturbed, unless it shall be made to appear affirmatively that their verdict is contrary to the weight of the material facts and weight of the preponderating circumstances established in the case.

This case was tried before one district judge who heard and denied the motion for a new trial, and afterward the motion was renewed, argued, and denied, and again he granted a reargument and denied it the second time; and both of these judges are well known for the fairness of their decisions and the impartiality of their rulings as

NEW trial: judicial discretion.

trial judges, and an appellate court should give due consideration to such facts when they appear in the record. A trial judge is frequently called upon to rule on matters and material facts which he sees transacted before him, and of which he must take notice as substantial things in the case, but do not and can not become a part of the record, and which the appellate court can have no knowledge of; and an appellate court should labor to affirm the findings of the jury when it shall appear from the whole record that the trial court proceeded in the regular and orderly manner prescribed by law, and that the result arrived at by the jury was fair and substantial justice to all parties concerned. The granting or refusing a new trial is a matter resting in the sound discretion of the trial judge to whom it is addressed, and it is not reversible unless it shall plainly appear that such discretion has been grossly abused; and that does not here appear. Territory v. Romero, 2 N. M. 474; Archeibeque v. Miera, 1 N. M. 160; Territory v. Webb, Id. 160; Coleman v. Bell, 4 N. M. 21, and cases there cited.

Many other grounds of error are assigned, but they are not well taken, and not pertinent to this case; and there being no fatal errors appearing from the record, the judgment of the lower court is affirmed.

SMITH, C. J., and BANTZ, J., concur.

[No. 628. October 10, 1895.]

ADDISON M. JANES ET AL., APPELLEES, v. MARCUS BRUNSWICK ET AL., APPELLANTS.

ESTATE OF DECEASED PERSON, CLAIM AGAINST—LIMITATION.—A claim against the estate of a decedent will be barred, under section 2225, Compiled Laws, 1884, unless filed with the clerk of the probate court within two years after decedent's death.

APPEAL, from a decree for complainants, from the Fifth Judicial District Court, Lincoln County. Modified and affirmed.

The facts are stated in the opinion of the court.

H. B. FERGUSSON for appellants.

W. T. THORNTON for appellees.

LAUGHLIN, J.—On the fourth day of September, 1885, complainant, Addison M. Janes, filed his bill of complaint in the district court for Lincoln county, for and on his own behalf, and in behalf of all others who might elect to come in and share in the expenses of the litigation as parties complainant, as creditors of the estate of John V. Winters, deceased, against James J. Dolan and Joseph A. La Rue, as administrators of the estate of said John V. Winters, deceased, and Marcus Brunswick and a number of other persons, in the bill named, as heirs of the said Winters, deceased, in which bill it was alleged that the said administrators refused to pay the claims of complainants, because the personal effects of decedent's estate coming into their hands were insufficient to pay the same.

The bill prayed for an accounting as to the amount due complainant from said estate, an accounting by the administrators of the personal estate received by them, an accounting of the real estate belonging to decedent at his death, of the incumbrances on the real estate, if any, of the rents and profits derived from the same, if any, and, in case of a deficiency in the personal estate to pay all creditors, that an order be made to sell all or a sufficient part of the real estate to pay any such deficiency against said estate. Afterward, a larger number of other creditors of said estate intervened, and were made parties complainant in the original bill filed by Janes. Parties who came in, as well as the original com-

plainant, had previously filed their claims against the estate with the clerk of the probate court of Lincoln county, and had the same allowed, and judgments entered therein against the estate. The administrators did not answer the bill, but the Winter heirs, after service by publication, appeared by counsel, answered, and pleaded the statute of limitation as a bar to the claims set up in the original bill, and to the claims set up in the intervening petitions. In 1889 the court overruled all pleas to the statute of limitations. Issue was joined to the answer of the Winter heirs, and the cause was, by consent of all the parties, referred to a special master to take proofs and report his findings of facts and conclusions of law thereon to the court, which was done; and on the incoming of the master's report in favor of complainants, counsel for the Winter heirs filed a number of objections and exceptions. The court disallowed the objections and exceptions, approved and confirmed the report, and the Winter heirs brought the case here on appeal.

This is an action in the nature of a creditors' bill in chancery, brought by the appellees, complainants below, against appellants, in which it is sought to subject certain real estate to the payment of the claims of a number of creditors against the estate of John V. Winters, deceased, contracted by him during his lifetime. It appears from the record that John V. Winters departed this life at White Oaks, Lincoln county, New Mexico, some time during the month of April, 1881; that he died seized of an undivided eight fifteenths (8-15) interest in and to a certain unpatented mining claim, supposed at that time to possess great value as a gold mine, and known as the "Homestake" or "Winters' Homestake" mine, situated in White Oaks mining district, Lincoln county, New Mexico, and certain personal property, of little value. Soon after his death, the probate court appointed James J.

Dolan and Joseph A. La Rue administrators, and they duly qualified and entered upon their duties as such; and the probate court appointed three reliable citizens of the county to appraise the value of all the property of the decedent's estate, which they did in the manner provided by law, and on their appraisement and report, and the evidence in the case, the special master found the value of personal property, which came into the hands of the administrators to be $234.18, the amount of indebtedness due these appellees to be $3,466.35, and the value of the real estate of said decedent's estate was $8,953.32. This left a deficiency in the personal property of $3,232.17, according to his report, and as confirmed by the court, to be paid out of the real estate.

The special master rejected and disallowed an item of $2,666.66, which the appraisers fixed as the interest of decedent's estate in a pile of ore upon the dump at the mine, the estimated quantity and value of which they estimated to be two hundred tons, worth $25 per ton, or $5,000. The master was amply justified by the proofs in deducting this from the personal property which came into the hands of the administrators, as the proofs show it was of little value, and was sold to the agent of the Winter heirs. Neither the estate nor the administrators ever received any of the proceeds, but whatever it was worth went to the appellants. But counsel for the Winter heirs contends that the ore was very valuable when it came into the hands of the administrators, and that they failed and neglected to take proper care of it, in their administrative capacities, and that it was wasted and carried off by "specimen hunters," and that they should be charged with its appraised value. This contention can not be maintained, because it is unsupported by the weight of the evidence and the preponderating circumstances in the case, and the master was supported in his conclusion on this point.

CLAIM against decedent's estate: limitation.

The appellants' first assignment of error is "that the court erred in overruling the pleas of the statute of limitations as to the accounts of Charles Fritz for $412.50, Ira E. Leonard for $325, and S. B. Newcomb for $300." The master did not allow Leonard's claim, and that will not be further noticed. Fritz's claim was filed in due time, and was properly allowed by the master. Newcomb's claim was not filed with the clerk of the probate court until the third day of March, 1884, and not until more than two years had expired from the death of the decedent, and was, therefore, barred under section 2225, Compiled Laws 1884, and the plea was well taken and is sustained as to that claim.

The court below found, on the master's report, that the administrators should be charged with $234.18, as the value of certain separate personal effects of the decedent, on the value fixed by the appraisers and the evidence in the case, and among the items making up this amount was one small horse, of the value of $37.50, which was stolen, one steer of the value of $30, which was diseased at the time, and soon thereafter died, and one log cabin, which was not on the surface ground of the mine, of the value of $50, and some old wearing apparel of decedent, of the value of $13.50, making the sum of $131. In view of the facts as they appear from the record, that these articles were not lost or wasted through any fault or neglect of the administrators, and the others were of no value, and unsalable, and that the administrators were not able to nor did they realize anything from any of them, they should not be charged with them, and they are only chargeable with $103.18, as the value of the personal property, which had theretofore come into their hands. The judgment of the court below is, therefore, modified to the extent that the claim of S. B. Newcomb for $300 is rejected and not allowed, and the administrators are to be charged

with $103.18, instead of $234.18, and this amount will be deducted from their commissions on final settlement, and the judgment of the court below is in all other particulars affirmed, and an order will be entered directing the lower court to enforce the decree as here modified and affirmed.

SMITH, C. J., and COLLIER, HAMILTON, and BANTZ, JJ., concur.

[No. 574. October 12, 1895.]

JOHN G. ALBRIGHT ET AL., APPELLEES, v. TEXAS SANTA FE & NORTHERN RAILROAD COMPANY ET AL., APPELLANTS.

CORPORATIONS—LIABILITY OF STOCKHOLDERS ON SUBSCRIPTIONS.—Where stock subscribed on the formation of a corporation, was sold upon an assessment made thereon, the creditors of the corporation were not precluded thereby from recovering on the failure of the stockholders to pay the ten per cent of their subscriptions, required by statute to be paid on incorporating; nor could such failure be set up by the stockholders in avoidance of the statute to escape liability.

ID.—PAYMENT OF SUBSCRIPTIONS IN CHECKS NOT TO BE PRESENTED—DATE OF OBLIGATION TO PAY.—Where the ten per cent of the subscriptions to the capital stock of a corporation, required by statute to be paid on the formation of the corporation, was paid in checks, which it was agreed should never be presented for payment, the obligation to pay dated from the day of the filing of the articles of incorporation in the office required by law to be filed.

ID.—RIGHT OF CREDITORS TO BE PAID OUT OF UNPAID SUBSCRIPTIONS—EVIDENCE.—The fact that the creditors of a corporation were told by officers of the corporation, before the indebtedness was incurred, that they would be paid out of the proceeds of certain bonds the corporation hoped to sell, was not sufficient to defeat their right to payment out of the unpaid subscriptions, where it was not claimed that the corporation, as such, had made any such agreement with the creditors, or that such officers had any authority to speak for the corporation, and the witnesses testified merely that they understood that the creditors "understood" that they were to look solely to the proceeds of the bonds for payment.

ID.—DISCOVERY OF FRAUD—LIMITATION.—Where it was stated in the articles of incorporation of a company that ten per cent of the subscriptions to its capital stock had been paid to the treasurer of the company, and the treasurer made affidavit that that amount had been actually paid him, the fact that, at the time an indebtedness was incurred by the corporation, the creditor was informed, by the treasurer, that such subscription had not been paid in, did not, under the statute, constitute a discovery so as to make the statute of limitations (Comp. Laws 1884, sec. 1865) begin to run.

ID.—PARTIES—ANSWER TO ORIGINAL BILL—SERVICE AND FAILURE TO ANSWER AMENDED BILL, EFFECT OF.—In such proceeding, where it appeared that one of the parties defendant answered the original bill, and was served with notice of the amended bill, but failed to answer the same, and complainant, instead of taking a decree pro confesso against him, treated him as having answered,—Held: That he was to be deemed as having denied the material allegations of the amended bill, and included in an affirmance of decree as to the other defendants.

APPEAL, from a decree for complainants, from the Second Judicial District Court, Bernalillo County. Affirmed; LAUGHLIN, J., dissenting.

The facts are stated in the opinion of the court.

E. A. FISKE for appellants.

W. B. CHILDERS for appellees.

COLLIER, J.—This is a bill in equity by John G. Albright and Alfred Grunsfeld, in behalf of themselves and other creditors who might come in and be made parties to the suit, against the Texas, Santa Fe & Northern Railroad Company, and also against Lehman Spiegelberg, Romulo Martinez, Antonio Ortiz y Salazar, Bernard Seligman, and Charles H. Gildersleeve, subscribers to the stock of said railroad company, as a corporation. It is alleged that the complainant Albright and one George H. Marshall respectively recovered judgments in the district court of Santa Fe county against said corporation, and that executions were issued, and returns of nulla bona were made on each, it

being alleged that the judgment recovered by Marshall had been assigned for value to the complainant Grunsfeld. The insolvency of the corporation is alleged, and that the other defendants were subscribers to its stock, as shown by the articles of incorporation, as follows, respectively: Spiegelberg, for two thousand shares; Seligman, two thousand shares; Martinez, one thousand shares; Ortiz y Salazar, five hundred shares; and Gildersleeve for five hundred shares,—each of the par value of $100 per share. It is also averred that neither of said defendants, who were charter subscribers, ever paid into the treasury of the corporation defendant any part of the par value of the stock so subscribed for, * * * and "that the failure to pay into the treasury of the said defendant corporation the par value of the said stock is in fraud of the rights of these complainants and other creditors of the said corporation defendant, and that the said funds consist and are the trust funds for the payment of the debts of the said corporation, and that the par value of each of said shares of stock is the sum of one hundred dollars." It is also alleged that the defendant Spiegelberg, as treasurer of the corporation defendant, received and had in his possession $80,000, part payment upon capital stock of said corporation, and that he has failed to account for same. The prayer of the bill is that defendants be decreed to pay the principal and interest on said judgments, and that they may "be decreed to apply for that purpose any money of property, real and personal, in law or equity, debts, choses in action, or equitable interests belonging to said defendant corporation, or in which it is in any way or manner beneficially interested," and for general relief. Demurrers were filed by all defendants, and overruled, and answers were filed by defendants Spiegelberg, Seligman, and Gildersleeve, and decree pro confesso was taken as to defendant corporation and defendants Ortiz y Salazar and Martinez. Upon

replication being filed to the answers that were filed, testimony was taken by special examiners, who reported same to the district court without any findings of law or fact. The proof being all reported to the court, the complainants obtained leave of the court "to amend the bill filed therein to correspond with the proofs taken, and that the defendants be required to answer the amended bill within twenty days from the service of a copy of the same, and that said cause be set down for trial as soon as the same is at issue on the amended pleadings." The amended answer was filed, which differed from the original bill in stating that Spiegelberg had failed to collect as said treasurer the ten per cent required to perfect the organization of said corporation; that the articles of incorporation alleged that ten per cent had been actually paid to said Spiegelberg as treasurer; that said articles were acknowledged and subscribed by said defendants, and that such treasurer had made affidavit that said ten per cent, amounting to $80,000, had been actually paid to him as treasurer for the benefit of the corporation; and that no such sum was in fact paid in, said subscribers delivering to Spiegelberg checks instead, in pretended payment, "it being then and there understood that the said checks should never be presented for payment." It is alleged that the defendants are liable for the entire value of the stock subscribed for, including said ten per cent. The prayer of the bill is that defendants may be decreed to apply for the purpose of paying said judgments said ten per cent, and for general relief. Defendants Spiegelberg and Seligman answered said amended bill, but the same was not answered by either of the other defendants.

The record is somewhat confused, but it is concluded that only the defendants Gildersleeve, Spiegelberg, and Seligman were served with notice of filing of amended bill, which was answered by the latter two and

not by Gildersleeve, as to whom, however, there was not taken any decree pro confesso. The answers of Spiegelberg and Seligman to the amended bill admit judgments obtained by Albright and Marshall, but deny there was such assignment to Grunsfeld as made him the real party in interest; deny insolvency of corporation defendant; deny that they lawfully subscribed for stock, and admit they paid nothing upon any subscription for stock; deny that said ten per cent is due, or that said ten per cent is a trust fund for the payment of debts. The answer sets up that Albright and Marshall, before said indebtedness was incurred, were advised that they must look for payment only upon a proposed sale of bonds of defendant corporation, and consented to look to the proceeds of such sale for payment, and not otherwise. It sets up the statute of limitations of six years, as follows: "That the said pretended cause of action and matters and things set up in said amended bill of complaint whereby the said complainants seek to charge this defendant, as stated in said bill of complainants, if in fact this defendant was in any manner chargeable with any such liabilities, matters, and things, which this defendant denies, accrued and existed above six years before," etc. A final decree was entered against the defendant company and the defendants Ortiz y Salazar and Martinez upon the decree pro confesso taken upon the original bill, and against the other defendants upon the proofs taken, it being recited in said final decree that Gildersleeve, as well as Spiegelberg and Seligman, had answered said amended bill, and that replications were filed, when in fact Gildersleeve had not answered same. The decree finds for complainants only as to the ten per cent in accordance with the prayer of the amended bill. So much for the record.

The testimony sustains the allegations of the bill and amended bill as to nonpayment of the ten per cent

payable at the time of organization of defendant company, and its insolvency, and the subscription for stock by the other defendants. There was also some testimony, claimed by defendants to show that prior to the incurring of indebtedness to complainants, and during the years 1881 and 1882, they were informed that the defendant company had no way of discharging the same except out of a proposed sale of bonds of the company, and that they were informed that the other defendants had never paid the ten per cent required to be paid in on organization, and that the checks of said defendants had been put up in lieu of cash. Extracts from the testimony are as follows: L. Spiegelberg (cross-examination): "Q. Do you know whether or not Mr. Albright and Mr. Marshall were aware of the situation in reference to that $80,000 in checks? A. I am well aware of the fact that Mr. Albright was. Q. At how early a time? A. It must have been during 1881 or 1882. Q. Mr. Albright was very well posted, was he not, as to all the steps taken in the organization of that company? A. Most assuredly he was, because he came to me either in 1881 or 1882, and asked me concerning the business, or the business he intended to do with T., S. F. & N. R. R. Co. I explained to him how matters stood in relation to any claim he might contract or have in relation to those checks. Mr Albright knew and was well informed that he nor anyone else could procure payment for any services rendered or to be rendered until bonds or stock had been disposed of. Q. Do you know whether or not he did the work for which he afterwards obtained judgment upon the agreement that he was not to receive his money until bonds and stock of the company were sold and funds raised? A. Yes, sir; the only work he did." On redirect examination this occurs: "Q. But you are positive that you told him that you had those checks, and payment was

not to be enforced? A. I am positive of that; not only I, but other parties except me." This witness in a supplementary statement says: "What I mean to say is that the complainant Albright, before his debt for which he sues in this suit was incurred, knew that the ten per cent paid in on so-called 'charter subscriptions' was paid in only on checks, which both the maker and the company agreed should never be paid; and that he agreed to do his work for the company and look to a subsequent sale of bonds and stock for his compensation." There is also testimony by other witnesses to the effect that both Albright and Marshall were told as early as 1881 or 1882 that there was no money in the treasury, and they would have to rely for payment on a proposed sale of bonds; but there is no direct testimony that Marshall was ever informed that the ten per cent had not been paid in cash. Albright testifies that he can not say positively whether he was told or not that the charter subscribers had paid their ten per cent in checks, which it was understood was not to be paid up, but was to be returned.

Inasmuch as the amended bill of complaint seeks a recovery only upon failure of the charter subscribers to pay in ten per cent of their subscription, required by territorial law to be done by incorporators of defendant company, no part of a large mass of testimony pertinent under the original bill filed in the cause is included in the foregoing statement of facts. Also for this reason those portions of counsel's briefs, which refer to assessment and forfeiture of the stock standing in the names of defendants as charter subscribers are not touched upon further than to say that, if complainants are otherwise entitled to recover in this suit, they would not be precluded by reason of the fact that the stock defendants are alleged to have subscribed for, when becoming incorporators of defendant company, was sold upon an

LIABILITY of stockholders on subscriptions.

assessment made thereon, if in fact the ten per cent required to be paid in had previously become due, and still remained, when this suit was brought, unpaid. The fact of an assessment upon said stock, made as it was by the defendants themselves, might tend to show their status as stockholders, if this court entertained any doubt on that question. We do not, however, believe there can be any dispute that these defendants became, by the recitals in the articles of incorporation, subscribers to the capital stock of defendant company in the number of shares they respectively state they were, and we think the form in which they stated they were subscribers is made in as unimpeachable a manner as it could have been. It is provided by statute that the articles of incorporation shall show, among other things, "the amount of stock actually subscribed and by whom," and "that at least ten per cent of its subscribed capital stock has been paid to" the treasurer of the intended corporation. Laws, N. M., 1878, p. 17. It appears to be conceded however, by appellants' counsel, that the defendants would have been legal subscribers to the capital stock of defendant company if they had in fact paid in the ten per cent required by law, as was falsely stated in the articles of incorporation; but he contends that the failure so to do, which is conceded to have occurred, prevented them from becoming legal incorporators, or being in any way bound as subscribers, and to this contention he cites a number of authorities. Those furnished us we have examined, and we ascertain that none of them refers to subscriptions made subsequent to organization, and one of the cases says: "Under this provision it has several times been decided that no subscription to stock of a railroad corporation, made after the corporation was formed, was valid or binding until at least ten per cent of the amount had been paid." N. Y. & O. M. Railroad Co. v. Van Horn, 57 N. Y. 473.

In another the question arose in quo warranto proceeding by the people, where it was claimed the defendant was illegally exercising the franchises and privileges of a corporation, and it was held that such an evasion of the statute as was here resorted to could not avail. People v. Chambers, 42 Cal. 201. We think these cases are not in point, and that it does not lie in the mouth of these defendants to urge their illegal avoidance of the statute to escape liability, the corporation being recognized, and no proceedings being taken to call its organization in question by the proper authorities, even if that could be taken advantage of as against creditors. It is contended by counsel for appellants that the ten per cent required by law to be paid at and before the filing of the articles of incorporation became due from the subscribers at that time, and as to this we think there can be no doubt. It seems plain that the law, in requiring the ten per cent, considered it as derivable from the incorporators ratably in the amounts each subscribed for stock,. or from those not incorporators who subscribed for stock in the intended corporation, and that such should be a partial payment on subscription, the call for which the law itself made. We hold, therefore, that nonpayment in cash, but a pretended payment made in checks never intended to be presented for payment, made the obligation to pay date from the day the corporation became a legal entity, which was on December 10, 1880, the day the articles of incorporation were filed in the office required by law to be filed.

PAYMENT of subscriptions in checks never to be presented: date of obligation to pay.

It is urged by appellants' counsel "that, as a general rule, unpaid subscriptions for stock are in equity a fund for the benefit of creditors; that to entitle the creditor to resort to this fund he must have relied upon and given credit on account of the capital which the company was represented as having when the debt was

RIGHT of creditors to be paid out of unpaid subscriptions: evidence.

created." Appellants' Brief, p. 27. He also insists that these creditors knew at the time the debts for which judgments were obtained, and here sued on, were incurred, that these subscriptions were paid for in checks not intended to be cashed, and they agreed to wait for payment of their indebtedness until defendant company should sell certain stocks and bonds to pay the same. Looking at the testimony which appears in the record on this point, and somewhat extensively set forth, what does it import, taking the strongest phase appellants may contend for? Spiegelberg, Seligman, and Gildersleeve testify that Albright and Marshall were told by individual members of the corporation, who were also its officers, that they would be paid for the services they had rendered and were to render the corporation out of the proceeds of certain bonds the corporation hoped to sell, and they say these creditors understood that was their only reliance. It is not asserted that the corporation, as such, had any such agreement with these creditors, or that the informants of these creditors were authorized by the corporation to so state. What does that avail? It certainly can not be contended that such an understanding could have been set up in the actions upon which judgments were obtained, or that the defendant company could successfully enjoin the sale of any property of defendant company upon such statements being made by these individual informants, who at the time happened to be members of the board of directors of defendant company. If we admit that the authorities cited by appellants' counsel go to the extent contended for, we yet do not think that here is a state of case to which they are applicable. What these witnesses say they understood these creditors "understood" is a mere matter of opinion, and we do not think such evidence should weigh greatly in removing from the reach of creditors what so many decisions in

unbroken line have held to be a trust fund for the protection of creditors who deal with a corporation on the faith thereof, and especially when so to do would be to make effective the perpetration of a fraud so directly in the teeth of a most salutary statute.

DISCOVERY of fraud: limitation.

The most difficult question in this case is that arising upon the plea of the six-years statute of limitations set forth in the above statement of facts. As there is no testimony in the record that tends to show that Marshall, the assignor of Grunsfeld, had any knowledge of the transaction whereby these defendant subscribers, instead of paying in the ten per cent upon subscription required by the statute, put up bogus checks, this question will only be considered in reference to the complainant Albright. If the testimony shows that there was such a discovery by Albright of the fraud practiced in the organization of defendant as made the statute of limitations begin to run, it would then be our duty to further consider whether the statute was well pleaded in equity, where the facts constituting the bar ought to be set up. If it does not show, we need go no further. In this case there was no reference to a master to report the testimony and his findings of law and fact thereon, but it was merely to a special examiner, directed to reduce the testimony taken before him to writing, and report the same to the court, without any findings of law or fact. This record is, therefore, before us just as it was before the district court,—a dry transcript, from which conclusions both of law and fact are to be drawn. In such case the whole matter is before this court as one of new impression, and if we differ with the conclusions of the district court on questions of fact, we are as much bound to express our dissent as if the difference were one of law. The value of a master's report rests upon the well-recognized theory announced by this court at this term

in the case of Marshall Field & Co. v. M. Romero & Co., that the master sees the witnesses, and hears them testify, and is far more capable of deciding questions of fact than any court by the mere perusal of a dry, dead transcript. Looking, then, at this transcript, what do we find? It shows the solemn statutory statement made by these defendants that they were subscribers to the capital stock of defendant company, and that ten per cent of such subscribed stock has been paid to the treasurer of said company, namely, Lehman Spiegelberg; and, in addition, it shows the affidavit required by law of said Spiegelberg, treasurer, that said ten per cent is "actually paid." No other witness than Spiegelberg pretends to testify that he knows that Albright was ever told about this payment by check transaction, but Seligman and Gildersleeve only testify that it was understood that Albright and Marshall "understood" that they must look to the sale of certain bonds to get their pay,—a matter we have already adverted to. Albright says that he has no recollection that he was ever informed about the check transaction. Concede, however, that Spiegelberg told him about it, does that, under our statute, constitute a discovery so as to make the statute of limitations begin to run? Our statute reads as follows: "In actions for relief on the ground of fraud or mistake * * * the cause of action shall not be deemed to have accrued until the fraud * * * complained of shall have been discovered by the party aggrieved." Comp. Laws, N. M., sec. 1865. Shall such a statement, made in an informal way by Spiegelberg, which not only controverts his affidavit, but also imputes fraud to all the incorporators of defendant company, be decreed a discovery fixing a period for the statute to begin to run against a creditor's right to subject a trust fund to his debt? It is our view that such slight circumstances should not serve to deprive creditors of a corporation

of their vested rights, and that such information, if given even more explicitly than is here shown, would not constitute discovery of fraud, or such notice as would create laches amounting to discovery.

As to the defendants Antonio Ortiz y Salazar and Romulo Martinez, we hold that the relief prayed in the amended bill comes within that prayed for in the original bill, and that it was not substantial error to fail to give them notice of the filing of the amended bill, and that final decree was rightly entered against them.

As to the defendant Gildersleeve, it appears that he answered the original bill, and was served with notice of the amended bill, but failed to answer the same. We think that, if complainants failed to take a decree pro confesso against him, but treated him as having answered, he should be deemed as denying the material allegations of the amended bill, and, as we have held these allegations were established by the proof, and as he can not complain of being treated with more consideration than he was entitled to, the decree of the lower court should also be affirmed as to him. Other questions in the record we do not understand to be seriously insisted on. Wherefore it is our opinion that, there being no error apparent of record in this cause, the decree should be affirmed, and it is accordingly so ordered, and this cause remanded, with directions to carry the decree into effect.

ANSWER to original bill: service and failure to answer amended bill, effect of.

HAMILTON, J., concurs. LAUGHLIN, J., dissents.

[No. 611. October 12, 1895.]

ABRAHAM D. COON, APPELLEE, v. BOSQUE BONITA LAND & CATTLE COMPANY ET AL., APPELLANTS.

MORTGAGES—ASSIGNMENT OF PART OF DEBT—FORECLOSURE—BILL BY MORTGAGEE FOR ACCOUNTING—ADVANCEMENTS FOR EXPENSES—DEFICIENCY JUDGMENT.—Where a holder of bonds, secured by deed of trust on certain property, transferred the bonds to one who foreclosed the deed and became the purchaser of the property at the sale for less than the amount due on the bonds,—on a bill for accounting, by the mortgagee, who had made advancements to the mortgagor for taxes, etc., and taken its notes for the same, complainant was not entitled to have such notes decreed a prior lien on the property, and the transferee also held personally liable on the notes.

ID.—ADVANCEMENTS—PROOF—FINDING.—But held: That the court did not err in sustaining the finding of the master that the amount of said notes was advanced by complainant in the payment of taxes and for the protection of the property from damage and loss, which was amply supported by the proofs.

ID.—ADVANCEMENTS—PRIOR LIEN—FINDING.—Nor did the court err in sustaining the finding of the master that it was provided by the deed of trust that, for all moneys so advanced by complainant to defendant, the same should become a first lien upon the mortgaged property and paramount to the bonds described in the deed, where it provided that in case of a sale and foreclosure, after the payment of the costs of sale, all other expenses of the trust including advancements for taxes and insurance, should be paid, then the principal and interest of the bonds.

ID.—BONDS SECURED BY DEED OF TRUST—PRIOR LIEN—NOTICE—ESTOPPEL.—The purchaser of bonds secured by deed of trust of record, securing also the payment of notes, is precluded from setting up want of notice that the notes, by the terms of the deed, are made a prior lien to the bonds.

APPEAL, from a decree for complainant, from the Second Judicial District Court, Bernalillo County. Modified and affirmed; COLLIER, J., dissenting.

The facts are stated in the opinion of the court.

of their vested rights, and that such information, if given even more explicitly than is here shown, would not constitute discovery of fraud, or such notice as would create laches amounting to discovery.

As to the defendants Antonio Ortiz y Salazar and Romulo Martinez, we hold that the relief prayed in the amended bill comes within that prayed for in the original bill, and that it was not substantial error to fail to give them notice of the filing of the amended bill, and that final decree was rightly entered against them.

As to the defendant Gildersleeve, it appears that he answered the original bill, and was served with notice of the amended bill, but failed to answer the same. We think that, if complainants failed to take a decree pro confesso against him, but treated him as having answered, he should be deemed as denying the material allegations of the amended bill, and, as we have held these allegations were established by the proof, and as he can not complain of being treated with more consideration than he was entitled to, the decree of the lower court should also be affirmed as to him. Other questions in the record we do not understand to be seriously insisted on. Wherefore it is our opinion that, there being no error apparent of record in this cause, the decree should be affirmed, and it is accordingly so ordered, and this cause remanded, with directions to carry the decree into effect.

ANSWER to original bill: service and failure to answer amended bill, effect of.

HAMILTON, J., concurs. LAUGHLIN, J., dissents.

[No. 611. October 12, 1895.]

ABRAHAM D. COON, APPELLEE, v. BOSQUE BONITA LAND & CATTLE COMPANY ET AL., APPELLANTS.

MORTGAGES—ASSIGNMENT OF PART OF DEBT—FORECLOSURE—BILL BY MORTGAGEE FOR ACCOUNTING—ADVANCEMENTS FOR EXPENSES—DEFICIENCY JUDGMENT.—Where a holder of bonds, secured by deed of trust on certain property, transferred the bonds to one who foreclosed the deed and became the purchaser of the property at the sale for less than the amount due on the bonds,—on a bill for accounting, by the mortgagee, who had made advancements to the mortgagor for taxes, etc., and taken its notes for the same, complainant was not entitled to have such notes decreed a prior lien on the property, and the transferee also held personally liable on the notes.

ID.—ADVANCEMENTS—PROOF—FINDING.—But held: That the court did not err in sustaining the finding of the master that the amount of said notes was advanced by complainant in the payment of taxes and for the protection of the property from damage and loss, which was amply supported by the proofs.

ID.—ADVANCEMENTS—PRIOR LIEN—FINDING.—Nor did the court err in sustaining the finding of the master that it was provided by the deed of trust that, for all moneys so advanced by complainant to defendant, the same should become a first lien upon the mortgaged property and paramount to the bonds described in the deed, where it provided that in case of a sale and foreclosure, after the payment of the costs of sale, all other expenses of the trust including advancements for taxes and insurance, should be paid, then the principal and interest of the bonds.

ID.—BONDS SECURED BY DEED OF TRUST—PRIOR LIEN—NOTICE—ESTOPPEL.—The purchaser of bonds secured by deed of trust of record, securing also the payment of notes, is precluded from setting up want of notice that the notes, by the terms of the deed, are made a prior lien to the bonds.

APPEAL, from a decree for complainant, from the Second Judicial District Court, Bernalillo County. Modified and affirmed; COLLIER, J., dissenting.

The facts are stated in the opinion of the court.

WILLIAM B. CHILDERS for appellants.

JAMES G. FITCH for appellee.

LAUGHLIN, J.—On the twentieth day of October, 1885, the defendant company, the Bosque Bonita Land & Cattle Company, a corporation organized and existing under the laws of the territory of New Mexico, executed a deed of trust to Antonio y Abeytia, as trustee, to secure the payment of twenty coupon bonds, for $500 each, payable in ten years after date to the order of complainant, A. D. Coon, or order, at the Chatham National Bank, in the city and state of New York, with interest at one per cent per month from date until paid. The deed of trust contained the usual clause for sale and foreclosure on the default of payment of any of the interest due at any time, or in case of a breach of any of the covenants or agreements in the same by the said company, or any part of the principal. The trust deed, bonds, and coupons were properly executed, issued, and delivered to said Coon, who advanced the said company $10,000 thereon: The trust deed charged, in trust, to secure the loan, certain live stock and real estate, the property of the said company, situate in Socorro county. It also contained a provision that, in the event of the death or inability of the trustee named to act, the sheriff of Socorro county should then act as such trustee. The trust deed also contained a clause, after stating the conditions of sale, "and all other expenses of this trust, including all moneys advanced for insurance, taxes, or for any money paid by the party of the third part," meaning Coon as the party of the third part. At different times thereafter, Coon advanced to the general manager of the company, with the knowledge and consent of the other officers, various sums of money, for the company, in addition to the $10,000

loan, for the purpose of paying taxes, repairing an acequia for irrigating alfalfa growing upon a portion of the mortgaged premises, and to throw up an embankment to protect the farming lands from inundation by the Rio Grande, and took notes from the company for the same, in amount of $957.82 with interest at one per cent per month from date until paid, which notes were signed by the said company, by Ira E. Leonard, president, and Charles O. Tiffany, secretary and treasurer, and approved by J. C. Tiffany, general manager, and were dated January 1 and April 10, 1886. In the latter part of February, 1887, J. C. Tiffany paid Coon the $10,000 and interest to that date with his personal check on the Albuquerque National Bank; and Coon indorsed the bonds and coupons "without recourse," and delivered them to said Tiffany, and held the original deed of trust, and the two notes which were not paid. Some time thereafter said Tiffany deposited all of the said bonds and coupons in the Albuquerque National Bank. Afterwards said Tiffany became personally indebted to said bank, and gave his notes and said bonds as collateral, and afterwards, on September 18, 1888, said company gave its two notes, for $5,000 each, to said bank, in lieu of Tiffany's personal notes. And the bank held the said bonds as collateral, and the bank made further advances, and took additional security; but when the company authorized the making of said two notes to said bank, and giving additional security, it expressly reserved in its resolution, from the effects of further incumbrances, the Bosque Bonita ranch, the real property here in controversy. In December, 1889, the complainant, Coon, filed his bill in the district court against the Bosque Bonita Land & Cattle Company, the Albuquerque National Bank, and the trustee sheriff, for an accounting, and for a decree for payment to him of whatever might be found due by the said

defendant corporation, or the Albuquerque National Bank, and that the sum so found due him on said promissory notes be decreed a prior lien on the mortgaged property, over the said bonds and coupons, and for complainant's solicitor's fees, and in case of default in the payment the property be sold and foreclosed; and for general relief. The Bosque Bonita Land & Cattle Company did not answer, or make any defense, but the Albuquerque National Bank answered the bill, and denied that the debt for which said two notes were given was, by virtue of the language in the defeasance clause in the mortgage deed,—"including all moneys advanced for insurance, taxes, or for any money paid by the party of the third part," sufficient to create a prior lien to that of said bonds, and was insufficient in law to bind the defendant bank, and denied that any power of sale existed by law in said mortgagee to sell and foreclose, except in default of payment of interest or principal, and then only at the instance of the holders of said bonds or coupons; and also denied that there was any agreement for future advance by said Coon to said company, other than the $10,000, at the time of the execution of the said mortgage, and that it was understood then that, for any further advance by Coon, additional security was to be given; denied that the debt on said notes was due and unpaid; averred that on February 19, 1891, said bank, as the holder of said bonds and coupons, sold and foreclosed said mortgaged property in accordance with the authority in said deed of trust contained, and became the purchaser of said mortgaged property, but denied that the property brought sufficient money to pay the sum of principal and interest due said bank on said bonds; with a general denial to all the material issues in the bill,—to which complainant filed a general replication, and the cause was referred by the court to a special master, to take proofs, and report his findings

of facts and conclusions of law thereon. The special master took the proofs, and reported his findings in favor of complainant. Defendant bank interposed objections and exceptions to the master's report, which were denied, and the report was confirmed, and a decree by the Fifth judicial district court was entered for the sum of $1,906.34 due complainant on said note, against the Bosque Bonita Land & Cattle Company and the Albuquerque National Bank, with an order for sale and foreclosure in default of payment by said company and said bank, and for a deficiency judgment in case the proceeds of sale did not satisfy the amount; and the property was sold and bid in by complainant. And from this decree and order defendant bank appealed, but did not give a supersedeas bond; and pending the appeal the venue was changed to the second district, and the report of the sale by the special master was there approved, and the case is here on appeal also from that court.

The appellant bank assigned a number of grounds as errors in the final decree and confirmation of the master's sale by the court below, and sufficient to raise all the issues material to a proper disposition of the case on its merits, and the first one which will be considered is: "Second. The court erred in finding by its decree that the Albuquerque National Bank was indebted to the complainant for and on account of the notes mentioned in the bill of complaint, and made by defendant the Bosque Bonita Land & Cattle Company." The principal contention of the appellee is that the debt due on the notes is a prior lien on the mortgaged property to the debt due on the bonds now held by the bank, and it is not clear how this contention can be successfully maintained by appellee; that is, how the bank can be holden for the amount due on the notes, and at the same time make the debt due on the notes a prior lien on the

ASSIGNMENT of part of mortgage debt: foreclosure: bill for accounting: advancements: deficiency judgment.

property given as security to secure the payment of the sum due on the bonds held by the bank and the amount due on said notes, because (admitting for the present that the bank is the legal holder of the bonds, and that the debts due on the bonds and on the notes were both secured by the same mortgage, and on the same property) it is not plain how the bank is individually bound for the amount due on the notes. This error is well taken, and it is sustained as to the individual liabilities of the Albuquerque National Bank.

The next assignment is: "Third. The master, as well as the court, erred in finding that the sums of money mentioned in said notes were advanced by complainant in the payment of taxes, and in protecting the property mentioned in the deed of trust mentioned in the bill of complaint from loss, destruction, and damage." The trust deed provided for these advances, and the proof shows that they were made by complainant at the request of the general manager of the company, and for the purposes specified, and with the knowledge, consent, and approval of all the officers and board of directors of the company; and the proof is clear that money was expended by the general manager for the protection and preservation of the property then holden for the security of the debts of the company, and which resulted in the protection of appellant's security, and, too, at the very times that these advances were made; and, while it is not clearly shown that the same money so advanced was used for the purposes indicated, there is nothing to show that it was not the same money so advanced by appellee. The general manager, to whom the advances were made, and all the other officers of the company who could have had any personal knowledge of these transactions, were dead prior to the time of the hearing of this case, and it was impossible to show directly how

ADVANCEMENTS: proof: finding.

the money was expended. The master's finding on this point is amply sustained by the proofs and this assignment is not well taken.

The fourth assignment is that "both the court and the master erred in finding that it was provided by said deed of trust that, for all moneys so advanced by complainant to the said defendant, the same should be and become a prior and first lien upon the said property, prior and paramount to the bonds described in the said deed of trust, and that complainant was entitled to such a lien upon said property for the sum of $1,906.34, or any other sum, against the appellant." The trust deed provided, in the defeasance clause, that in the event of a sale and foreclosure of the mortgaged property there should be paid, first, the costs and the expenses of the sale, "including the reasonable fee of the said party of the second part [the trustee], and all other expenses of this trust, including all moneys advanced for insurance, taxes, or for any money paid by party of the third part, including interest thereon at one per cent per month, then to pay the principal and interest of said bonds. * * *" It is established by the evidence that at the time the deed of trust was presented to Coon, for inspection and examination, by the officers of the Bosque Bonita Land & Cattle Company, and before it was signed and delivered to Coon, the question came up for discussion as to the future advances to the company by Coon for insurance and taxes, and that the officers of the company told Coon that the company would need money for other purposes, and that before the mortgage was executed the words, "or for any money paid by party of the third part," were written into the instrument, and became a material part of it. Appellant contends that the words so interlined were not sufficient to constitute the mortgage security for the advances made by appellee, but

ADVANCEMENTS: prior lien: finding.

this position can not be supported, because it was the bona fide intention of all parties concerned that any future advances made by Coon should be secured by this mortgage, and, had that not been the intention, these words would never have been written into that instrument; and there is nothing in the mortgage that can, with any reasonable intendment, be construed to defeat it.

Appellant further contends that, even if the mortgage can be so construed as to make it a security for any future advances, it cannot be held to constitute such a prior and paramount lien to that of the bonds held by the bank. The proofs show that appellee advanced money at different times to the company, and took one note dated January 1, 1886, due one day after date, and the other note dated April 10, 1886, due thirty days after date, and that all these advances were made and the notes taken during the time he held the bonds, and about a year before he delivered them to Tiffany, and there is nothing to show that any default was made on the bonds. These notes were given for money advanced to pay the taxes and other current expenses,—for the protection of the mortgaged property, and to save it from loss and destruction,—and the trust deed especially provides that such expenses shall first be paid out of the proceeds of the sale. Both of these notes were due in the latter part of May, 1886, and default on the part of the company to pay them gave appellee a right of action against the company. But appellant further contends, that by the terms of the trust deed, there was no power for sale and foreclosure, except on default of interest on the bonds, or some part of the principal thereof. This is true, but the holder of a mortgage, or an equitable lien, may proceed in a court of chancery to have his lien established and declared, and an order of sale

BONDS secured by deed of trust: prior lien: notice: estoppel.

and foreclosure, as in the case at bar. This right of action on the notes existed long before any right to foreclose under the bonds. It would hardly be contended that the appellee would be required to advance money for the payment of taxes, insurance, and for the protection of the property in other respects, and be compelled to wait ten years for the return of his money, because the mortgagor happened to keep his interest paid up; otherwise the mortgagee might be compelled to advance more money than the property was worth, or lose his principal, by reason of incumbrances on the property, or its loss or destruction. It is a well settled principle of law that the breach of any of the covenants will render the whole sum due, and this applies as well to future advances. Shirras et al. v. Craig et al., 7 Cranch, 35; Lawrence v. Tucker, 23 How. 14; Jones v. Guaranty & Indemnity Co., 101 U. S. 622. The deed of trust was a public record when the bonds were delivered by J. C. Tiffany to the appellant bank, and the clause for future advances in it was sufficient to put the bank on inquiry, and it is now estopped from setting up want of notice; and especially as the delivery of the bonds to the bank was not accompanied by the delivery of the original trust deed, and no explanation was given why it was not delivered with the bonds.

It is held here that the sum of $1,906.34 found to be due to the appellee, Abraham D. Coon, by the special master and the court below, constituted and is a prior and paramount lien, in favor of said appellee, to the amount due on said bonds and coupons, and that the final decree made and entered by the Fifth judicial district court be modified by striking out the decree and judgment for the indebtedness claimed, as against the appellant, the Albuquerque National Bank, and that the final decree, in all other respects, be, and the same is, affirmed, and that the decree approving the sale of the mortgaged property by the Second

judicial district court be, and the same is, affirmed, with an order to said court to require the said special master to execute and deliver the deed as therein required.

SMITH, C. J., and BANTZ, J., concur.

COLLIER, J. (dissenting).—I must dissent from the majority opinion and the judgment of the court in this case. I think the principle of limiting general words by the context in which they appear is overridden in that opinion, and that only "money paid by the party of the third part," as in some way incidental and subservient to the securing of the $10,000 debt and interest, was contemplated in the clause of the deed of trust upon which this cause turns. The fact that money which might be advanced under that clause would stand on the same footing as if advanced for insurance and taxes, and that it is a claim superior in dignity to the main debt, are reasons, of themselves, sufficient to forbid the idea that future advances, in the way of additional loans, were being provided for. If these general words are limited by the context, then it must be that the money must be "paid" in the way of providing for "expenses of the trust;" and, as advancing money for insurance and taxes is agreed by the parties to be among "the expenses of the trust, other things, like unto insurance and taxes or other such moneys, are meant, and no more. Money advanced for improvements on the property, such as constructing embankments to prevent overflow by the Rio Grande from an apprehended flood, or to provide irrigating ditches for raising crops, I respectfully insist, are not of the nature of either insurance or taxes. Even though the evidences may have tended to show that at the time the money was advanced to dike the Rio Grande a flood was imminent, and that the value of the security would have been

greatly impaired if such dike had not been constructed, yet, as such evidence does not show that at the time of the execution of the deed of trust, there was any such fear, nor show that such flood was anything unprecedented, or even very extraordinary, I do not think the expenditure for such a dike can be considered anything but a mere loan, not covered by the clause in question. If it were a question of advancing money to repair damages caused by the act of God, it might come under the principle of money advanced for insurance, but this I even doubt, as the clause in question could not, by any fair rule of construction, include expenditures for throwing up embankments to protect the land from the river, or for raising crops on the land, I think no money has been paid by the complainant which entitles him to proceed against the security for the obligation held by the bank. This view, also, would dispose of the question of notice to the bank. I think the decree in favor of complainant should have been set aside, and his bill dismissed.

[No. 632. October 12, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. MAXIMIANO GRIEGO, APPELLANT.

CRIMINAL LAW—MURDER—PENALTY—ERRONEOUS JUDGMENT, POWER OF SUPREME COURT TO CORRECT.—Where, upon indictment for murder in the first degree, the jury returned a verdict of guilty, and the court sentenced defendant to imprisonment in the penitentiary for a term of years, when, under a statute in force at the time the crime was committed, the penalty therefor was death,—Held: That, under section 2479, Compiled Laws, 1884, relating to appeals in criminal cases, the supreme court has no power to enter, or to order the trial court to enter, a different judgment; but the defendant is not entitled to a discharge for such error, where the indictment is valid, and nothing has occurred thereunder amounting to an acquittal.

ID.—MURDER—INSTRUCTION—VERDICT—RECOMMENDATION TO MERCY—CONSTRUCTION OF STATUTE.—A charge to the jury, on a trial upon indictment for murder in the first degree, that, in case they found defendant guilty, the court would consider a recommendation to mercy in fixing his punishment, was an unauthorized interference with the deliberations of the jury, and reversible error. The statute (Acts 1891, p. 151), permitting the jury to recommend clemency, has no application to cases where the punishment is single and specific, and where no discretion is allowed as to the punishment to be inflicted. Territory v. Romine, 2 N. M. 114.

APPEAL from a judgment of the Fifth Judicial District Court, Socorro county, convicting defendant of murder in the first degree, and sentencing him to imprisonment in the penitentiary. Reversed and remanded; LAUGHLIN, J., dissenting.

The facts are stated in the opinion of the court.

A. A. FREEMAN for appellant.

JOHN P. VICTORY, solicitor general, and H. M. DOUGHERTY, district attorney Socorro county, for the Territory.

Urging a jury to return a verdict is proper. Thomp. on Trials, sec. 2302, note 4 and citations.

The court may recall a jury and, on its own motion, give them additional instructions. Leonardo v. Territory, 1 N. M. 297; Thomp. on Trials, secs. 2363, 2364, 2365, and citations; Commonwealth v. Snelling, — Mass. 321, 333; State v. Pitts, 11 Iowa, 343.

The instruction of the court as to mercy was proper. Laws 1891, p. 151, sec. 10. It would be proper even if the law absolutely fixed the punishment. State v. Pomeroy, 120 Mass. 600.

Or some favor might be extended by the court to the prisoner, but it constitutes no part of the verdict. State v. Fink, 1 Bay, 165; State v. Merrell, 38 S. C. 83; Whar. Crim. Pl. and Prac., sec. 457, and citations

in notes; Stevens v. State, 51 Ga. 338; State v. Stewart, 9 Nev. 13; 16 Id. 42.

And so far as punishment is concerned, may be entirely disregarded by the court. People v. Lee, 17 Cal. 76.

If the lower court erred in pronouncing sentence, this court will not reverse the trial and conviction, but will remand the case with instructions to pronounce sentence according to law. Beale v. Commonwealth, 25 Pa. 22; McCue v. Commonwealth, 78 Pa. St. 175; 21 Am. Rep. 8.

BANTZ, J.—The defendant, charged with the murder of one Griego in November, 1886, was tried on an indictment found at the May term, 1895, of Socorro county. The jury returned a verdict against him of murder in the first degree. Under the statute in force when the crime was committed the penalty for murder in the first degree was death. The court sentenced him to imprisonment in the penitentiary at hard labor for twenty-five years. It was contended for the defendant that the judgment was not warranted by the verdict, and that defendant was entitled, not merely to a reversal of the case, but to his discharge. By the prosecution it was contended that the error, if error at all, was one which was beneficial to defendant, and, even if judgment was one of imprisonment when it should have been death, this court can and should correct it so far as to order the court below to enter judgment for the death penalty. Neither contention can be sustained under our statute concerning appeals in criminal cases. Section 2479, Compiled Laws, 1884, provides: "When an appeal is taken by the party indicted, if the supreme court affirm the judgment of the district court, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly. If the judgment be reversed, the supreme court shall direct a

MURDER: penalty: erroneous judgment, power of supreme court to correct.

new trial, or that the defendant shall be absolutely discharged according to the circumstances." Under this statute, if the judgment was reversible, the prisoner must be given a new trial, or he must be discharged, this court has no right to enter, or to order the court below to enter, a different judgment, without a trial anew, but the prisoner will not be entitled to his discharge if there is a valid indictment, and nothing has happened amounting to an acquittal upon it. In re Friedrich, 51 Fed. Rep. 747.

It appears from the record in this case that after the jury had retired to consider their verdict, and had been out for forty hours, they returned into court, and reported that they were unable to agree. Thereupon the judge, while disclaiming any desire to influence their verdict, spoke of the importance of their agreeing if it was possible. He alluded to the importance of this particular case as affecting public interests, and of the expense it had caused. The following colloquy between the judge and jury then occurred: "The Judge: Gentlemen, I know it is a great hardship for you to be locked up. I appreciate the situation you are in, but in the interest of the public I think it my duty to give you every possible chance to agree upon a verdict. Mr. Freeborn [one of the jurors], how do you feel this morning? Mr. Freeborn: Pretty bad, sir. Judge: Is there anything I could give you, or order for you,—any medicine or doctor? Mr. Freeborn: No, sir; I have some medicine. Judge: Is there any kind of food you would like to have? Mr. Freeborn: No, sir. Judge: While I dislike to keep you locked up, gentlemen, I think it my duty to give you one more chance. Mr. Stackpole [another juror]: It strikes me that everything has been done that can be done to find a verdict in this case, and the jury is only punished. It is almost impossible to find a verdict. Judge: Gentlemen, as I said awhile ago, I

think I will give you one more chance in this case, to see if you can agree. You can retire and make another trial." This occurred between 8 and 9 o'clock in the evening. The jury retired, and at 11 o'clock the following morning the jury returned into court, and the following occurred: "Judge: Gentlemen, have you agreed upon your verdict? Jury: No, sir. Judge: Gentlemen of the jury, there is an instruction in the charge which I might have given you ordinarily, which I did not give you, but which the law authorizes me to give. It is this: While the law fixes the punishment in the case, or rather while the court assesses the punishment, the law authorizes you, in case you find the defendant guilty, to recommend him to the mercy of the court; and that recommendation made by the jury will be considered by the court in fixing the punishment. I thought it proper, gentlemen, to give you these instructions, and have brought you in for that purpose. This is all I have to say to you, and you can retire to your room." The jury retired, and in half an hour the jury returned the following verdict:

"We, the jury, find the accused, Maximiano Griego, guilty as charged in the indictment. Owing to the long lapse of time since this murder has been committed, the jury recommends the prisoner to the mercy of the court. RICHARD STACKPOLE, Foreman."

We think these recitals from the record render it quite apparent that the sudden agreement of the jury, after being out and unable to agree for fifty-four hours, was influenced quite powerfully by the judge's instructions that a recommendation of mercy would receive his consideration in fixing the punishment. It seems within the range of reasonable probability that with a knowledge that nothing but the death penalty would be the consequence of their verdict, no agreement could

INSTRUCTION: verdict: recommendation to mercy: construction of statute.

have been secured from the jury. The gravity of the punishment may well have caused jurors to hang to a doubt of guilt rather than hang a man whose guilt they doubted. Coming, as it did, without request, after the jury had been deliberating and unable to agree for fifty-four hours, it was an indication, quite pointed, of the judge's opinion. Randolph v. Lumpkin, 10 L. R. A. (Ky.) 88. It was an intimation from the court of a lighter sentence than the jurors had expected, and must have been harmful to the defendant. People v. Harris, 43 N. W. Rep. (Mich.) 1060. In McBean v. State, 53 N. W. Rep. (Wis.) 497, the jury sent an inquiry to the judge whether they could depend upon his clemency if they brought in a verdict of guilty. The judge answered, "Yes." On appeal the conviction was reversed, and the supreme court say: "The promise thus secured was calculated to overcome reasonable doubts, and coerce an agreement for conviction. It was an unauthorized interference with the deliberations of the jury. * * * Any promise, pledge, or declaration of the trial court, calculated to draw the attention of the jury away from the evidence, and induce them to base their verdict upon ulterior considerations, is necessarily misleading, and hence erroneous." A charge like this to the jury upon some particular matter, and under these circumstances, was a suggestion that the court believed it to be of controlling importance in the case. Swaggerty v. Caton, 1 Heisk. (Tenn.) 202. Though a man who had committed a cold blooded murder would perhaps have cause to congratulate himself that he had saved his neck at the expense of his liberty, it will furnish no argument for finding the easier method, by way of the penitentiary, for finding the defendant guilty of murder in the first degree. The statute which permits a jury to recommend clemency (Acts 1891, p. 151) has no application to those cases where the punishment is single and specific, and

where there is no discretion allowed as to the punishment to be inflicted. Territory v. Romine, 2 N. M. 114. Counsel for the prosecution do not controvert this, but say that the jury had the right to make it for the consideration of the governor to influence a pardon or commutation of sentence. The plain answer is that in this case the judge told the jury that he would consider it in fixing the punishment, not that the governor might afterward. The judge had no right to hold out any promises to the jury, much less one which he could not lawfully fulfill. The legislature has fixed the punishment of death; and, as was said by Lord Chief Justice HOLT in King & Queen v. Walcott, 4 Mod. 400: "When the law of England appoints a particular judgment for an offense, it is not in the power of the judge to alter it, either by addition or diminution." See, also, In re Friedrich, 51 Fed. Rep. 747, affirmed in 149 U. S. 70. The fact that the punishment inflicted in this case seems to be milder than that which the law imposed is of no consequence. Even in cases where the legislature has altered the penalty for an offense after it was committed, the general rule is that, except where the new law merely dispenses with all or a divisible portion of the punishment imposed by the old law, it is considered as ex post facto. Suth. St. Const., sec. 470. If this be true, then the change in the law can no more be made after the offense, by the sentence of the judge, than it could by the legislature. In Hartung v. People, 22 N. Y. 95, the legislature, after an offense was committed, altered the punishment of murder from death to imprisonment at hard labor in the penitentiary. Mr. Justice DENIO said: "It was highly probable that it was the intention of the legislature to extend favor, rather than increased severity, toward this convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases,

rather than that which existed when they committed the offenses of which they were convicted. But the case can not be determined upon such considerations. * * * We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature can not thus experiment upon the criminal law. In Shepherd v. People, 25 N. Y. 414, it was said that, if the constitutional security against ex post facto laws depended upon whether the old or the new law be the "more merciful or lenient, you leave it to the discretion of the legislature and the courts to say whether the new punishment is or is not more merciful or lenient than the old; and such a construction of the constitutional prohibition would impair its value and certainty of protection." See, also, Lindzey v. State, 65 Miss. 542; Cooley, Const. Lim., 324; Kring v. Missouri, 107 U. S. 221.

The declaration of law made in this case, that upon a recommendation of clemency by the jury the judge would consider it in fixing punishment for murder in the first degree, was erroneous, and, being erroneous, if it can have had any influence on the jury, their verdict ought to be set aside. This was the rule laid down by MARSHALL, C. J., in Etting v. Bank, 11 Wheat. 75, and since then the supreme court of the United States has established a rule even broader. Thus in Deery v. Cray, 5 Wall. 807, Justice MILLER says that, while a cause will not be reversed for error which has worked no injury, "whenever the application of this rule is sought it must appear so clear as to be beyond a doubt that the error did not and could not have prejudiced the party's rights." See, also, Gilmer v. Higley, 110 U. S. 47; Boston & Albany Railway Co. v. O'Reilly, 158 U. S. 337. For the foregoing reasons this cause is reversed, and remanded for a new trial.

COLLIER, J., concurs.

LAUGHLIN, J. (dissenting).—I feel constrained to disagree with the majority of my brothers upon the bench, and believe it is a duty incumbent on me to express my views, and give my reasons for dissenting from the able opinion handed down on the important questions raised in this case.

STATEMENT of the case.

The appellant, Maximiano Griego, was indicted, tried, and convicted of murder in the first degree, at the May, 1895, term of the district court for Socorro county, for the murder of one Juan, alias Alvino, Priesto, in the county of Socorro, on November 26, 1886. The remaining facts will appear in the opinion.

Appellant's counsel have assigned a great number of errors, but only those considered in the opinion of the court will be considered here. After the jury had been out nearly fifty-four hours deliberating on their verdict, the presiding judge called them in, and gave them the following additional instructions, to wit, "Judge: Gentlemen, have you agreed upon your verdict? Jury: No, sir. Judge: Gentlemen of the jury, there is an instruction in the charge which I might have given you ordinarily, which I did not give you, but which the law authorizes me to give. It is this: While the law fixes the punishment in this case, or rather while the court assesses the punishment, the law authorizes you, in case you find the defendant guilty, to recommend him to the mercy of the court; and that recommendation made by the jury will be considered by the court in fixing the punishment. I thought it proper, gentlemen, to give you these instructions, and have brought you in for that purpose. This is all I have to say to you, and you can retire to your room." The jury retired, and in about half an hour returned into court with the following verdict: "We

the jury, find the accused, Maximiano Griego, guilty as charged in the indictment. Owing to the long lapse of time since this murder has been committed, the jury recommend the prisoner to the mercy of the court." Appellant contends, and with much force, too, that this instruction, together with the colloquy cited in the opinion of the court between the judge and the jury, influenced the jury to his prejudice, and that it is a fatal error, because such an instruction is not authorized by law in cases where the offense is murder in the first degree, and where the court charges only in that degree. The statute on that subject is section 10: "In the trial of all criminal cases punishment within the limits prescribed by law shall be assessed by the court in its discretion; but juries may, in their discretion, upon return of a verdict of guilty in any criminal case, recommend defendant to the clemency of the court, and any such recommendation shall receive due consideration by the court." Laws 1891, p. 151. The court disclaimed to the jury in plain language any intention to in any manner influence the jury in their deliberations, and it is perfectly plain that he did not intend to so do, and it should not be presumed by this court that the trial court varied intentionally in any manner from his duties and responsibilities, upon the trial, unless it shall affirmatively appear from the record to the contrary. If the statute, supra, means what it says, and if that meaning is to be favored with a plain common-sense construction, then it was the duty of the court to give the instruction in question. It is the duty of the trial court to instruct on all the law applicable to the case, and if it was error at all it was in favor of appellant, and not such that he can be heard to complain of. This statute specially provides that juries may, in their discretion, recommend the defendant to the clemency of the court, and that such recommendation shall receive due consideration by the court.

It could not, I believe, be contended that, if the court had failed to give the alleged fatal construction, and the jury of its own motion had returned a verdict with the recommendation for clemency to the court, that it would have been a void verdict, or that the court would have been authorized in refusing to accept it with that recommendation in it. I think a court would be guilty of error to refuse to receive such a verdict, and would err not to give such "recommendation due consideration."

But it is contended by appellant that the court was powerless in the premises, and was compelled to pass sentence of death by hanging by the neck until dead, and that the court committed a fatal error in not doing so; and this may be true, considering the whole record together. But the court is not powerless in such matters when he has such a recommendation from the jury. He could, with that as a basis, recommend the defendant to the governor, and secure executive clemency, and a commutation to imprisonment, and it is well known that on the petition of the jury like this, and on the recommendation of the trial judge, executive clemency is seldom, if ever, refused. And there are many other ways in which a trial court can properly aid the prisoner after conviction. Moreover, to say that the jury were influenced by the objectionable instructions is to hold that they disregarded their solemn oaths, and I can not see anything in that instruction even tending to support that contention, unless it is that the jury returned a verdict very soon after the instructions were given; and this is a presumption not authorized by law. The legislature had an object and purpose in view, no doubt, when the statute, supra, was enacted, for putting into it the provision authorizing the jury to recommend the prisoner to the clemency of the court, because from 1846 to that time (1891) it had been the province of the jury to

assess the punishment in all cases, and it is evident that the legislature intended by the insertion of that clause to reserve to the jury that right in all criminal trials, and it is only humane and proper in its intent and effect. These views are not unsupported by respectable authority. The following excerpt is from the case of State v. Murrell, 33 S. C. 99: "Because his honor erred in bringing into court the jury and making the following statement: 'By the Court: Have you agreed on your verdict? The Foreman: No, sir. The Court: Is it a question of law? The Foreman: We think so. We wish to know if we can supplement our verdict with a recommendation to mercy. The Court: Yes, sir. The law provides that in certain cases the jury are allowed to supplement the verdict with a recommendation to mercy, and that of itself changes the verdict. In cases like this, a recommendation to mercy would have its influence with the court. It would not be binding upon the court, but it would have its influence upon the court. There is no provision that the court shall be governed by the recommendation, but, of course, the court is always, more or less, owing to the circumstances, governed—influenced, I should have said—by the recommendation of the jury.'" The court in that case held that the court below did not err in giving the jury the instruction above quoted, although the offense was a capital one; and that case was decided in 1890. And in support of the opinion citations are made. State v. Frink, 1 Bay, 165; State v. Gill, 14 S. C. 415. It is true, many decisions can be, and have been, in the opinion of the court, cited against this contention.

The court passed sentence on the appellant here, and assessed his punishment at twenty-five years' confinement in the New Mexico penitentiary. The statute fixes the punishment on conviction for murder in the first degree at death, and I fully concur in the opinion

of the court that the sentence to a term of imprisonment was erroneous; but I do not concur in the opinion that that error is sufficient to reverse the case for a trial de novo. The statute provides (Comp. Laws 1884, sec. 2479): "When an appeal is taken by the party indicted, if the supreme court affirms the judgment of the district court, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly; if the judgment be reversed, the supreme court shall direct a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case." Id., sec. 2480: "When the appeal has been taken by the territory, if the judgment of the district court be affirmed, the party shall be discharged; if reversed, the supreme court shall direct the district court to enter up judgment upon the verdict rendered; or, when no judgment has been rendered, to proceed to trial on the indictment." It is held in the opinion of the court that this court can do only one of two things under section 2479, supra; that is, to affirm or reverse for a trial anew.

Assuming that the trial was in all respects regular, and that no reversible error intervened in the record, I believe that this court had the power, as an appellate tribunal, to remand the case, and order the court below to pass sentence on the prisoner in accordance with the verdict returned by the jury. It will be seen by section 2480, supra, that this court is required when the appeal is taken by the territory, and the judgment of the lower court is reversed, "the supreme court shall direct the district court to enter up judgment upon the verdict rendered." Suppose the district court had, on the incoming of the verdict of the jury, sustained a motion in arrest, and that the territory had prosecuted an appeal from that decision, and this court

had reversed it, would it, in such an event, be contended that a trial de novo should be had on the indictment? I think not. I think this court would direct the court below to enter up a judgment upon that verdict as rendered. If this position is correct, can any sound reason be given why a rule should be applied to the defendant when he is the appellant other than that applied to the territory when it is the appellant? Those two sections are parts of the same act, and a part of the Kearney Code, and have been in force since 1846, and I am unable to see why this court has not the same power to direct the lower court to enter up a judgment upon the verdict, when the party indicted appeals, that it has when the territory appeals. The party indicted should have the same right to a new trial in either case, if the trial and conviction was proper, fair, and impartial in both instances; and, so far as the opinion of the court in this case is considered, the trial was fair and impartial, except as to the instructions, and the form of the sentence therein passed upon, which I am now considering. In one case exception is taken after trial to the indictment; the court sustains it, and the territory appeals and succeeds, and this court directs the court below to enter up judgment upon the verdict as rendered, and the defendant is denied a new trial. In the other case, exception is taken to the sentence of the lower court, and it is overruled, and he appeals, and succeeds on that point in this court, and is allowed a new trial. After reading the two sections, supra, together, it will be seen that the distinction is reduced to a refinement, and such a refinement is not at this time a part of the common law. In re Friedrich, 51 Fed. Rep. 747, is cited in the opinion of the case as authority. That was an opinion by United States Circuit Judge Hanford in habeas corpus proceedings in a case somewhat like the one at bar. The defendant was tried and convicted of murder

in the first degree, in the state of Washington, and the trial judge passed the death sentence on him in accordance with the law, and on a review of the case by the supreme court that court found that the facts did not sustain the verdict in the first degree, and under section 1429, Hill's Code of that state, which provides that "the supreme court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had," instead of reversing and remanding for a new trial, it ordered that the verdict stand, and remanded the case to the court below, and directed it to enter a judgment against the prisoner, adjudging him guilty of murder in the second degree, and to proceed thereon in accordance with law; and from that the prisoner sued out a writ of habeas corpus. In commenting on the section of the Code, supra, the learned circuit judge said: "This law does not, in terms nor by implication, give any power not usually possessed by appellate tribunals. Power to modify a judgment or direct a proper judgment is given; and power to order a new trial of a cause, whereby the verdict of a jury may be annulled, is given. But to the word 'judgment' in this statute must be given its true legal and accurate definition. It does not stand as a synonym for the word 'verdict;'" and he then proceeds to quote from a very able opinion of Mr. Justice GRAY in Com. v. Lockwood, 109 Mass. 323, in which he says: "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which sustains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact

thus ascertained." This is a clear and strong-drawn distinction between the office of a verdict and the judgment or sentence of the court, and this court has the power, under section 2480, supra, to direct the court below to enter a judgment upon a verdict rendered when the territory is appellant. And Mr. Justice HANFORD, in commenting on the Washington statute, supra, expressly says that "this law does not, in terms nor by implication, give any power not usually possessed by appellate tribunals." And if that statute in express terms does not confer any additional power on that court, under our statute (section 2479, supra) does this court possess the power to direct the court below to enter up a judgment upon the verdict rendered in accordance with law? The error in the Washington supreme court was in directing the court below to enter a judgment not authorized by the verdict. This was clearly an invasion by the court on the province of the jury in an attempt to pass upon the facts and find a verdict. This no court has any right to do, however pure, just, or wise it may be. And in this respect the case is very dissimilar from the case at bar, and from the contention here urged.

It is contended in the opinion of the court that the decision in the case of In re Friedrich, 13 Sup. Ct. 793, is conclusive in the case at bar. That is true in so far as it applies. That is the same case, and on the same point, passed on by Circuit Judge Hanford in 51 Fed. Rep. 747. Mr. Justice JACKSON, in speaking for the supreme court, said: "At common law the general rule undoubtedly was that where an erroneous judgment was entered by a trial court, or an erroneous sentence imposed, on a valid indictment, the appellate court, on error, could not itself render such a judgment as the trial court should have rendered, or remand the case to the trial court with directions for it to do so, but the only thing it could do was to reverse the judgment,

and discharge the defendant. This rule was recognized in England in the case of Rex v. Bourne, 7 Adol. & E. 58, when the court of king's bench reversed the judgment of the court of quarter sessions, and discharged the defendants, because the sentence imposed upon them by the court was of a lower grade than that which the law provided for the crime of which they had been convicted. Some of the states in which the common law prevails or is adhered to have adopted the same rule, but in most of the states it is expressly provided by statute that when there is an error in the sentence, which calls for a reversal, the appellate court is to render such judgment as the court below should have rendered, or to remand the record to the court below with directions for it to render the proper judgment; and this practice seems to prevail in the state of Washington." It will be seen here that the opinion of this court does not follow either proposition laid down by the supreme court of the United States in the case cited. It did not reverse and discharge the prisoner, it did not render any judgment as to the court below, nor did it remand the record to the court below with directions for it to render the proper judgment on the verdict, but it did reverse the case, and remand it for a trial anew on the indictment.

In Benedict v. State, 12 Wis. 313, a defective or erroneous judgment was entered in the court below, because it was not in accordance with the statute, and Chief Justice DIXON, after commenting on and reversing the judgment because it did not contain the words "hard labor and solitary confinement," said: "We are of opinion that the sentence or judgment which the law declares shall be pronounced upon the plaintiff in error for the crime of which he stands regularly convicted according to the laws of the state, has not yet been pronounced; and, as it is doubtful whether this court has the power to supply the deficiency, the

proper course appears to be for us to order the court below to proceed to give judgment on the conviction. In thus disposing of this case, we have adopted the practice of the court of king's bench in England, when, under like circumstances, a procedendo is awarded. See King v. Kenworthy, 1 Barn. & C. 711; (8 E. C. L. 196); Reg v. Holloway, 5 Eng. Law & Eq. 310." In that state a statute exisited in almost the same words as that of the state of Washington, supra, and the court held that: "The case must, therefore, be remitted to the court below, with directions that that court proceed to pronounce the judgment required by law." Beale v. Com., 25 Pa. 22, was a case on an erroneous sentence, and Chief Justice LEWIS, in delivering the opinion of the court, on that point said: "The doubts which formerly existed respecting the power of the supreme court upon reversing a judgment in a criminal case are entirely dissipated. We have authorities to show that the supreme court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the court below ought to have passed. Drew v. Com., 1 Whart. 281; Daniels v. Com., 7 Barr. 375; Com. v. Ellis, 11 Mass. 465; Kane v. People, 8 Wend. 211. It has also the power to award a procedendo in a criminal case. Rex v. Kenworthy, 1 Barn. & C. 711. And it may, in its discretion, remit the record with orders to proceed on the indictment, after reversal of an erroneous judgment. Com. v. McKisson, 8 Serg. & R. 422; Com. v. Church, 1 Barr. 110. The act of the sixteenth of June, 1836, conferred no new power in this respect. It was designed to remove doubts which had arisen in consequence of conflicting decisions. The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether because the court com-

mitted an error in passing sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors, and to 'minister justice.' But such a course would perpetuate error, and produce the most intolerable injustice." In the case of Dodge v. People, 4 Neb. 220, where the sentence and judgment were erroneous because the prisoner was not present in court when it was pronounced, the contention was made that by reason of this error the supreme court of that state had no power to either pass sentence or to remand the case to the district court with instructions to pronounce sentence in conformity to law. And Mr. Justice MAXWELL, delivering the opinion of the court, said: "We are aware that cases can be found holding, under a statute similar to ours, that there is no authority in this court either to reinstate the prisoner or remand the case to the court below for that purpose. We may correct errors in any other respect, so that the accused has had a fair trial, and that his rights have been properly guarded and secured; but the moment it appears that the court has not fully complied with the law in pronouncing sentence, it is at once ousted of jurisdiction, and the accused must go acquit. This doctrine, originating in England at a time when the courts of that country held that they had no authority to review proceedings and judgment in cases of felony, and grant new trials, partakes of the reasoning of that period that the judgment in a criminal case was absolute, unless a pardon was granted; that, if the judgment did not conform to the law, there was no power of revision or amendment; and, as the prisoner could not be held on an invalid judgment, he must, therefore, be discharged.

This doctrine was expressly overruled in King v. Kenworthy, 1 Barn. & C. 711; Reg v. Holloway, 5 Eng. Law & Eq. 310; and the English courts now hold

that they have full authority in such cases to impose the sentence required by law. * * * This case is therefore remitted to the court below, with directions to proceed to pronounce judgment on the verdict in the manner prescribed by the statute." In the case of Williams v. State, 18 Ohio St. 46, the error assigned was an erroneous judgment and sentence, and the court, in passing upon the error, said: "As the error in this case is only in the insufficiency of the judgment and sentence of the court, their reversal will not affect the validity of the conviction. The case will be remanded to the court of common pleas of Defiance county, whither the plaintiff in error will be sent, for judgment and sentence upon the verdict of the jury pursuant to law." The same doctrine was maintained in Richett v. State, 22 Ohio St. 405. And in Peglow v. State, 12 Wis. 534, where the error assigned was an erroneous sentence because the words "at hard labor," were left out, Chief Justice DIXON, in passing on that error, said: "The judgment which the law authorizes and requires has not been pronounced, and the case stands as if no attempt to do so had ever been made. The circuit court is therefore directed to proceed to give judgment in this case in accordance with the requirements of the law. Let the record be remitted to the court below with directions to that effect." In the case of People v. Riley, 48 Cal. 549, Chief Justice WALLACE said: "The defendant was indicted and found guilty of the crime of house-breaking in the daytime, which is an offense punishable by imprisonment in the state prison for a term not exceeding five years. Upon the coming in of the verdict the court adjudged the defendant to suffer imprisonment in the state prison for the term of ten years. The judgment is therefore reversed and the cause remanded, with directions to the court below to proceed to judgment on the verdict." There are other state authorities affirming the

doctrine hereinbefore cited, but it is not necessary to cite them here.

I have assumed, for the purpose of this dissenting opinion, that there are no other assignable errors than the two hereinbefore stated, and upon which the opinion of the court is founded; and upon that assumption I contend: First, that the court did not err in giving the supplementary instructions as to the jury recommending clemency; and, that not being an assignable error, that, second, this court should have remitted the record, with directions to the court below to pronounce sentence upon the verdict rendered according to law.

I am unable to see why the county of Socorro should be put to the expense and delay of another trial de novo, if there were no errors on the former trial on its merits, simply because the court passed an erroneous sentence. He was ably defended; all his rights were fully presented and fairly passed upon by the trial court; and the jury found him guilty on the facts as charged in the indictment, and the county should not be called upon to bear the expense of another trial on the same facts unless prejudicial error intervened on the trial. It only affords him another opportunity to escape the punishment of a crime of which a jury of his peers have found him guilty. It is a bad precedent to establish in this territory that when a fair and impartial trial has been had on a valid indictment, and a verdict rendered on the facts by a jury, the accused should be awarded a second trial on the indictment, because an erroneous judgment and sentence was entered by a clerk or passed by the court. It seems to me to be a waste of valuable time, a needless expense to the public, and a possible subversion of justice to require a trial anew of this cause. The general rule is that history never repeats itself with reference to lawsuits, but the general underlying principles for the disposition of criminal cases always remain the same,

among which are that the indictment must be valid, and the jury a legal one; that all the rights of the accused must be guarded and protected by the court; that he must be confronted face to face by his accusers; that he must be present in court during all the proceedings of the trial and at the passing of the judgment, and must be asked why sentence should not be pronounced upon him; that he is entitled to the presumption of innocence of the crime charged, and that that halo of innocence surrounds and continues with him until the contrary is made to appear affirmatively to the jury by legal evidence to the exclusion of all reasonable doubt; and when he has been awarded these rights he has had a trial by due process of law, and he is not then entitled to another trial de novo on the indictment.

[No. 622. October 12, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. SUSANO ORTIZ, APPELLANT.

CRIMINAL LAW—TRIAL BY JURY—CONSTITUTIONAL LAW.—The common law jury of twelve men is the jury provided by article 6 of the amendments to the constitution of the United States, guaranteeing to the accused, in all criminal prosecutions, the right to a "speedy, public, trial by an impartial jury;" and a jury consisting of any less than this number is not a common law jury or such as is contemplated by the constitution.

ID.—FELONY—WAIVER OF RIGHT TO TRIAL BY COMMON LAW JURY.—The accused in a felony case can not waive his constitutional right to a trial by common law jury of twelve men, and a verdict by a jury of less than that number will be set aside. Cooley, Const. Lim. 319.

APPEAL, from the First Judicial District Court, Santa Fe County, convicting defendant of a felony. Reversed and remanded; SMITH, C. J., dissenting.

The facts are stated in the opinion of the court.

CATRON & SPIESS for appellant.

The organic act of the territory provides that no person shall be deprived of the right to trial by jury in cases cognizable at common law. Act 1850, sec. 19.

The constitution of the United States guarantees to the accused, in all criminal prosecutions, the right to a "speedy, public trial by an impartial jury," etc. Const. U. S., art. 6. It also declares that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws." Const. U. S., art. 14.

"The constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States." Rev. Stats. U. S., sec. 1891.

That the term "jury" mentioned in the organic act and the constitution refers to and is understood to contemplate a jury as constituted at common law, can not be controverted. Cancemi v. People, 18 N. Y. 128; State v. Cox, 8 Ark. 436; Work v. State, 2 Ohio St. 296; Brazier v. State, 44 Ala. 387; Cruger v. R. R., 12 N. Y. 190.

It is clear that a legally constituted petit jury, according to the common law, consisted of neither more nor less than twelve men. 2 Hale, P. C. 161; Bac. Abr. "Juries."

Upon the trial of an indictment for a capital offense or felony, the requirement of the law, that the jury must consist of twelve men, is imperative, and this requirement can not be waived by the defendant. Mansfield v. State, 41 Mo. 471; Cancemi v. People, 18 N. Y. 128; 7 Am. Law Reg. 289; Hill v. People, 16 Mich. 351; People v. O'Neil, 48 Cal. 257. See, also, Brown v. State, 8 Blackf. 561; Jackson v. State, 6 Id.

461; Madusha v. Thomas, 6 Kan. 153; Brown v. State, 16 Ind. 496; Allen v. State, 54 Id. 461; Com. v. Shaw, 7 Am. Law Reg. 289; Dixon v. Richards, 2 How. (Miss.) 771; Ayers v. Barr, 5 J. J. Marsh, 286; Oldham v. Hill, Id. 300; State v. Van Matre, 49 Mo. 268; State v. Meyers, 68 Id. 266; State v. McClear, 11 Nev. 41; Bell v. State, 44 Ala. 393; Williams v. State, 12 Ohio St. 622.

JOHN P. VICTORY, solicitor general, for territory.

The evidence of the earmarks of Tomas C. de Baca was clearly admissible under the evidence of Andres C. de Baca. It was relevant as bearing on the identity of the animals, if for no other reason, and the most that can be urged against it is that it was immaterial. Chavez v. Territory, 6 N. M. 455.

The allegation that the court erred in permitting the territory to endeavor to prove ownership in the Rael and Baca evidence by earmarks not recorded in Santa Fe county fails to point out the particular evidence objected to on this ground, nor does it show that any objection was made to the evidence when offered. Territory v. Anderson, 4 N. M. (Gil.) 213; Territory v. Hicks, 6 Id. 596. The facts of this case are similar to those in Territory v. Ortiz, number 621, and the law governing the same having been already discussed in that case, it is unnecessary to reiterate here a subject already gone over.

BANTZ, J.—The defendant was indicted, tried, and convicted for a statutory felony, and was sentenced to a term of three years' imprisonment in the penitentiary, and to pay a fine of $1,000, and costs. The error assigned is based upon the following recital in the record: "The regular panel of the jury having been exhausted, and only eleven qualified jurors secured for the trial of this cause, by agreement of said parties, by their re-

spective attorneys this cause is tried before said eleven jurors." It is claimed that a judgment based upon the verdict of eleven jurors, in a felony case, must be reversed.

TRIAL by jury: constitutional law.

The constitution of the United States, by article 6 of the amendments, provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy, public, trial by an impartial jury." By section 1891 of the Revised Statutes, congress has declared that "the constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States." The jury provided for by the constitution is the jury known to and recognized by the common law, and is a body consisting of neither more nor less than twelve men. 2 Hale, P. C. 161; Bac. Abr. "Juries," A. Any less than this number would not be a common law jury, and not such as the constitution guarantees to accused parties. Cancemi v. People, 18 N. Y. 128.

FELONY: waiver of right to trial by common law jury.

But it is urged that the defendant, by his attorney, consented, in open court, to go to trial with a jury consisting of eleven, and that he thereby waived the constitutional right to a common law jury. The authorities differ as to whether the consent of the defendant to a trial by a jury of less than twelve will preclude him from objecting to the verdict, in felony cases. In State v. Kaufman, 51 Iowa, 581; State v. Grossheim, 75 Iowa, 75, 44 N. W. Rep. 541; State v. Sacket, 38 N. W. Rep. (Minn.) 773,—it is held that defendant may thus waive his right to a jury of twelve, even in felony cases. But we think the weight of authority holds to the view that in felony cases the constitutional right to a trial by a common law jury of twelve can not be

waived, and a verdict by a jury of less than that number must be set aside. Cancemi v. People, 18 N. Y. 128; State v. Cox, 8 Ark. 436; Work v. State, 2 Ohio St. 296; Brazier v. State, 44 Ala. 387; Mansfield v. State, 41 Mo. 471; Hill v. People, 16 Mich. 351; People v. O'Neil, 48 Cal. 257; Brown v. State, 16 Ind. 496; Allen v. State, 54 Ind. 461; State v. Van Matre, 49 Mo. 268; State v. Meyers, 68 Mo. 266; State v. McClear, 11 Nev. 41; Williams v. State, 12 Ohio St. 622; Murphy v. Com., 1 Metc. (Ky.) 365; Tyra v. Com., 2 Metc. (Ky.) 1; Opinion of Justices, 41 N. H. 550; Dowling's case, 13 Miss. 664; State v. Everett, 14 Minn. 447. "The infirmity, in case of a trial by jury of less than twelve by consent, would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would, in effect, be an attempt to submit to a species of arbitration the question as to whether the accused has been guilty of an offense against the state." Cooley, Const. Lim. 319. It has been urged in the brief of the learned solicitor general for the territory that the constitutional protection extends, not merely to a trial by jury, but also to a speedy trial by an impartial jury, and that, as the defendant may waive a speedy trial, and as he waives his right to object to a juror for partiality or bias by failing to challenge him, so, with equal reason, he can waive a constitutional right to a jury as constituted at common law, composed of twelve men. But the reasoning is more plausible than sound. If a prisoner is not given a speedy trial, he will be entitled to his discharge, unless the delay happen on his application or by his consent. The provision intended for the benefit of the accused does not bind him to speed the trial, as it does the prosecution. The question of the partiality of a juror is one largely of fact, determined upon by the exercise of discriminating judgment under all circumstances; and hence, until the prisoner

declares his judgment by electing to challenge, he is to be presumed to have considered the juror as unobjectionable. On the other hand, when a prisoner denies his guilt, then, before punishment can be adjudged and inflicted, he must be given a trial before a tribunal known to the law,—one having the power to declare his guilt, and on whose judgment alone punishment can be pronounced and inflicted. That tribunal can not be created by consent of the parties, in case of a felony. The guilt of the defendant not having been determined in this case by a tribunal known to the law, the judgment and sentence of the district court are reversed, and the cause is remanded for trial.

COLLIER and HAMILTON, JJ., concur; SMITH, C. J., dissents.

[No. 613. October 12, 1895.]

UNION TRUST COMPANY OF NEW YORK, APPELLANT, v. ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY; J. H. MADDEN, INTERVENER, APPELLEE.

JUDGMENT—VALIDITY.—Where the record showed that the court ruled the "defendant A., T. & S. F. R. R. Co., to plead," and when the plea was filed, it used, as the title of the case, "James H. Madden v. N. M. & S. P. R. R. Co.," and then followed the plea, "and defendant, the Atchison, Topeka and Santa Fe Railroad Company, by its attorney, * * *" and issue was joined on this plea, trial had, and judgment entered, though the record was confused, it was sufficient to sustain the judgment.

ID.—IMPEACHMENT OF RECORD—CLERICAL OMISSIONS.—The record of a judgment can not be impeached by an ex parte affidavit; nor can mere clerical omissions by the clerk, as to the entry, defeat the judgment.

ID.—ORDER BY CONSENT—VALIDITY.—An order of court, made by consent of the parties, in a proceeding for the foreclosure of a mortgage and the appointment of receivers, requiring them to pay certain outstanding claims against the insolvent, is binding upon the parties until set aside by the court making the order.

ID.—FORMER DECISION ON IDENTICAL QUESTION—RES ADJUDICATA.—A decision of this court in a cause, on a former appeal, that the reversal of the judgment in the cause as to one of the defendants did not operate as a reversal as to the other, is res adjudicata as to the same question raised on a second appeal in the cause.

APPEAL, from the First Judicial District Court, Santa Fe County, directing the receivers to pay intervener the amount due him on the judgment in his favor. Affirmed.

The facts are stated in the opinion of the court.

H. L. WALDO and W. B. CHILDERS for appellant.

The judgment of November 11, 1892, was a judgment against the New Mexico & Southern Pacific Railroad Company, alone. But if it should be held that the entry, as appears of record of that date can not be impeached, it is still contended that to all legal intents the letters "A., T. & S. F. R. R. Co.," are so many hieroglyphics, and mean nothing. The court can not import into them a significance other than that which they bear on their face. Accola v. R. R., 30 N. W. Rep. 503.

"In an action of trespass against three, if one dies pending the writ, and yet judgment is given against all three in writ of error upon this judgment, the whole judgment shall be reversed, because it is entire, though the writ by the death abates but against one." 3 Bac. Abr., p. 383. See, also, Richards v. Walton, 10 N. Y. C. L. Rep. 434; Sheldon v. Quinlan, 5 Hill. 442; Frazier v. Williams, 24 Ohio St. 627; Powers v. Irish, 23 Mich. 439; Fuller v. Robb, 26 Ill. 248; Kimball v. Tanner, 63 Id. 521; Rush v. Rush, 19 Mo. 442; Ins. Co. v. Clover, 36 Id. 393; Williams v. Bank, 11 Wheat, 414; Mussins v. Cabazos, 20 How. 230; Shelden v. Clifton, 23 Id. 481; Masterson v. Howard, 10 Wall. 416; Freem. on Judg., sec. 136, and citations; 1 Black, sec. 211, and citations; 2 Bac. Abr. [1 Am. from 6 London Ed.], p. 500.

But if the judgment be considered as a valid judgment, it was a lien on real estate for sixty days after its rendition, and no longer. The first entry was made in November, 1891, the second in November, 1892. The receivers were appointed in March, 1894. A judgment is not a lien on real estate except by compliance with the act of 1891. Acts 1891, chap. 67, p. 125.

As to personal property, of course only an execution is a lien. The order appointing the receivers included all contracts made within six months prior to the appointment. Burnam v. Bowen, 111 U. S. 783; Foschick v. Scholl, 90 U. S. 235; Huidelsoper v. Locomotive Works, 99 U. S. 260. See, also, Miltenberger v. R. R., 106 U. S. 286; Union Trust Co. v. Sutton, 107 Id. 591.

WARREN, FERGUSSON & GILLETT for appellee.

The first error assigned is sufficiently answered by the record itself, and by the decision of this court. N. M. & S. P. R. R. v. Madden, 7 N. M. 215.

The fact that Madden's petition refers to the original judgment entry of December 28, 1891, is immaterial. Aldrich v. Maitland, 4 Mich. 205; Smith v. Chenault, 48 Tex. 455; Collins v. Hyslop, 11 Ala. 508; Wilson v. Vance, 11 Humph. 189; Taylor v. Taylor, 64 Ind. 326; Holcomb v. Tift, 20 N. W. Rep. 627; Finnegan v. Manchester, 12 Iowa, 521; 1 Black, Judg., sec. 116.

The fact that both railroad companies were defendants, and that judgment was rendered against them both, is sufficient, as between the parties themselves, whether the clerk's entry was in the singular or plural as to the defendants. 1 Black, Judg., secs. 110, 106; Craig v. Alcorn, 46 Iowa, 560; Bridges v. Thomas, 50 Ga. 378. See, also, Bank v. Raynor, 61 Cal. 145.

Clerical misprision, or error, is not permitted to defeat the actual judgment of the court. Freem. on Judg., sec. 72.

The purpose of the statute of 1891, requiring the transcript to be filed in the office of the recorder within sixty days after the judgment, is to give notice of the lien to third persons, such as subsequent purchasers. Freem. on Judg., sec. 343; Foster v. Chapman, 4 McCord, 291; Close v. Close, 28 N. J. Eq. 472; Ridgway's Appeal, 15 Pa. St. 177; Black on Judg., secs. 397, 404; Wood v. Reynolds, 7 Watts & S. 406; Hess v. Mann, 40 Wis. 560; Metz v. Bank, 7 Neb. 165; Sterling v. Early, 69 Iowa, 94.

There is no law or fixed rule, prescribing that preferential claims shall be liens, or shall have accrued within six months, or within any other period, before the appointment of receivers, but the court is governed by the equities of each case. Farmers, etc., v. Kansas City, 53 Fed. Rep. 187; Hale v. Frost, 99 U. S. 389; Burnham v. Bowen, 111 Id. 776; Blair v. R'y, 22 Fed. Rep. 471; Trust Co. v. St. Louis, 41 Id. 551; Trust Co. v. Wabash, etc., 30 Id. 187; Dow v. R'y, 20 Id. 260; Trust Co. v. R'y, 117 U. S. 434; Trust Co. v. Morrison, 125 Id. 591; Railroad v. Humphreys, 145 Id. 82.

The rule contended for by appellants applies only to actions ex contractu, and has no application to actions ex delictu, such as the case at bar. 1 Black on Judg., sec. 207; Hayden v. Woods, 20 N. W. Rep. 345; Cauthorn v. King, 8 Ore. 138.

LAUGHLIN, J.—The appellee intervener, James H. Madden, filed his suit in trespass on the case in August, 1888, in the district court for Bernalillo county, against the New Mexico & Southern Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railroad Company, for damages on account of personal injuries

received by the plaintiff through the negligence of their servants, agents, and employees in running and operating the cars of defendant companies. Issue was joined on separate pleas of the general issue by each, and the case was tried by a jury, and a verdict returned in favor of plaintiff for $3,000, against the defendant companies, in December, 1891. Thereafter the defendant companies jointly moved for judgment in their favor on the special findings, which was denied; and in November, 1892, defendants jointly moved to set aside the verdict, and for a new trial, which was also denied, and judgment was thereupon entered in favor of the plaintiff. March 23, 1893, the defendant the Atchison, Topeka & Santa Fe Railroad Company, sued out its separate writ of error, and the case was docketed in this court as number 534. April 23, 1893, the defendant the New Mexico & Southern Pacific Railroad Company sued out its separate writ of error, and that case was docketed in this court as number 536; and it gave a supersedeas bond to stay execution. Both cases were returnable to the July, 1893, term of the supreme court. On August 3, 1893, the writ of error sued out by the Atchison, Topeka & Santa Fe Railroad Company (No. 534) was, on motion of appellee, not resisted by appellant, dismissed; and thereafter, at the same term of this court, the case of New Mexico & Southern Pacific Railroad Company (No. 536) was reversed and remanded, with directions to the court below to dismiss the case as to that defendant company, which was done; but this court expressly refused to set aside and vacate the judgment against the Atchison, Topeka & Santa Fe Railroad Company, or to take any action in that part of the case. Upon receipt of the mandate to the lower court on the case reversed, plaintiff, Madden, moved for judgment against the Atchison, Topeka & Santa Fe Railroad Company, and pending that motion the venue of that case was changed to Santa Fe county.

On December 23, 1893, the United States circuit court for the district of Kansas (Judge Caldwell presiding), on the application of the Union Trust Company of New York in a suit for mortgage foreclosure proceeding against the Atchison, Topeka & Santa Fe Railroad Company, appointed three receivers, who thereupon took charge of all the property of defendant corporation. On January 26, 1894, in the district court at Santa Fe (Judge Seeds presiding), as auxiliary to the original foreclosure suit before Judge Caldwell, the same three gentlemen were appointed receivers for said defendant corporation, and all its property in New Mexico. On June 15, 1894, plaintiff, Madden, as intervener in the foreclosure proceedings, filed a petition in the district court at Santa Fe for an order on the receivers to pay the amount of his judgment, which was by the court granted; and, the receivers declining to pay the same, the Union Trust Company of New York brought the case here by appeal, but neither the Atchison, Topeka & Santa Fe Railroad Company nor the receivers appealed.

The appellant, the Union Trust Company, assigned, as the first ground for reversal, that "the court erred in holding that the record showed any judgment whatever had been rendered against the Atchison, Topeka & Santa Fe Railroad Company, as claimed by appellee, on the twenty-eighth day of December, 1891." The judgment here complained of, as entered by the clerk, is as follows, viz.: "James H. Madden (No. 2,691) v. N. M. & S. P. R. R. Co. et al. This cause having been heretofore heard upon defendants' motion for judgment on the special findings of the jury herein, and the court now being fully advised, doth order that the same be denied; and it is further ordered that the plaintiff's motion heretofore filed, for judgment as per verdict of jury herein, be sustained. Wherefore, it is

JUDGMENT: validity.

ordered and adjudged that the plaintiff do have and recover of the defendant the said sum of three thousand dollars damages, together with the costs herein to be taxed, and that execution issue therefor." The contention by appellant is that the judgment is defective because it does not mention the defendant the Santa Fe Company in its corporate name. The record shows that the court ruled the "defendant A., T. & S. F. R. R. Co. to plead," and when the plea was filed it used, as the title of the case, "James H. Madden v. N. M. & S. P. R. R. Co.," and then follows the plea, "And the defendant the Atchison, Topeka & Santa Fe Railroad Company, by its attorney. * * *" And on this plea issue was joined, trial had, and judgment entered. The record is confused, and in bad condition to get a clear understanding of the case, but, all taken together, it is sufficiently plain to sustain the judgment; and that objection is not well taken, as to this point.

IMPEACHMENT of record: clerical omissions.

The next assignment is "that the court erred in holding that the entry under date of November 11, 1892, constituted a judgment against said defendant." The form and title of that judgment is: "No. 2691. James H. Madden v. N. M. & S. P. R. R. Co. and the A., T. & S. F. R. R. Co. Trespass on the case. This cause having heretofore been heard upon the defendants' motion for a new trial, and taken under advisement, and the court being fully advised in the premises, overrules said motion. Whereupon, it is ordered, by the court adjudged, that plaintiff have and recover from the defendants the sum of three thousand dollars damages, and the costs herein to be taxed, and that execution issue therefor." It is contended here that this judgment is defective and a nullity for the same reasons suggested as to the first judgment,—because it does not state the corporate name of the defendant

company; and it is still further urged by appellant that the judgment was entered up as in the singular number, and after the adjournment of the court the clerk's attention was called to the fact that it should have been entered up against both defendant corporations, and that thereupon the clerk so changed it as to read in the plural number, and as against both companies: and in support of this last contention an affidavit of one H. K. Pinkney, who was working at the time in the clerk's office, was filed, and is a part of the record, in which it is stated that he, under directions from the clerk, changed the said judgment by adding the words, "And the A., T. & S. F. R. R. Co.," and putting in the letter "s" whenever necessary to make said judgment read in the plural. To hold that the record of a judgment may be impeached by an ex parte affidavit, as is attempted here, would be a dangerous precedent, and would open wide the gates for impeaching and rendering void the solemn acts of any court of record, and subject to defeat the rights of litigants after adjudications by the courts. The affidavit of Pinkney, the amanuensis of the clerk of that court, is incompetent, and can not be used to attack the judgment collaterally in the manner here attempted. As before stated, both the defendant corporations were sued jointly. Both were properly served, and appeared by counsel, but each filed separate pleas. Verdict and judgment was rendered against both jointly, but each sued out writs of error separately. The judgment against the New Mexico & Southern Pacific Company was reversed, and ordered dismissed, because the proofs did not sustain the verdict, and the writ of error of the Achison, Topeka & Santa Fe Company was dismissed by this court without resistance on the part of the appellant company; and the mandate of this court to the court below, ordering a reinstatement and dismissal of the case against the New Mexico & Southern

Pacific Company expressly stated that "in a certain cause lately pending before you, wherein James H. Madden was plaintiff, and New Mexico & Southern Pacific Railroad Company and A., T. & S. F. R. R. Co. were defendants, by your consideration in that behalf, judgment was entered against said defendants, * * * by you in form given, be reversed, and that the said cause be remanded to you, with directions to set aside the judgment aforesaid, as to the New Mexico & Southern Pacific Railroad Company." There is no doubt but that all parties understood that a judgment was obtained and entered by the court, against the Santa Fe Company, and the alleged errors as to the technical irregularities of the form of the judgment are unavailing, as between the parties to it; and mere clerical omissions by the clerk, as to the entry, are not sufficient to defeat the judgment. Los Angeles Co. Bank v. Raynor, 61 Cal. 145; 1 Black, Judg., secs. 106–110, and cause there cited; Freem. Judg., sec. 72, and cases there cited.

The third assignment is that the court erred in holding that the judgment, if any there was against said defendant, was a lien upon the mortgaged property, and earnings thereof, in the hands of said receivers. Madden, the plaintiff below, was attempting to enforce the collection of his judgment when the receivers were appointed, and his execution was then in the hands of the sheriff; and levy could have been made, had it not been for the order appointing the receivers, as the writ of error had been dismissed by this court. This claim comes within the class designated for payment in the order of Judge Caldwell when he appointed the receivers; and Judge Seeds evidently intended it to come within his order when he appointed the same receivers, and, if he did not, his subsequent order for its payment brought it within that class. All parties to the foreclosure pro-

ORDER by consent: validity.

ceedings consented to the order of Judge Caldwell, when he made it, and they are bound by it until that order is changed by the court making it. These conditions were imposed by the court before the order was made, and the parties in interest acquiesced and accepted them, and whether or not that court had the power and jurisdiction to make the order imposing the conditions contained in the order is not a question now for this court to pass upon.

FORMER decision on identical question: res adjudicata.

It is further contended by appellant that, because the judgment below in favor of Madden was jointly against both defendant corporations, the reversal of the judgment against one acted as, and had the effect of, a reversal against both defendants. This contention can not be maintained, because the same propositions seem to have been raised and passed upon by this court in the case against the New Mexico & Southern Pacific Company, the court saying: "But plaintiff in error claims that if the judgment, as to it, is reversed or set aside, the judgment against its codefendant should also be reversed. To this we can not agree. Defendant sued out writ of error. If its codefendant desired a reversal, it should have asked for it. While, if the judgment against it is not good, because indorsed 'A., T. & S. F. R. R. Co.,' instead of Atchison, Topeka & Santa Fe Railroad Company, as is contended, then there is nothing for us to reverse." New Mexico & S. P. R. Co. v. Madden, 7 N. M. 215. That decision, in so far as it applies, is the law of this case, and is res adjudicata as to that part of this case. The contention urged is applicable to actions ex contractu, but the case at bar is ex delicto, and in the nature of a tort, and the rule does not apply to such actions. Tort feasors are jointly and severally liable, and in a suit, founded upon a tort, against several defendants jointly, "the plaintiff may recover against as many, and only

such, as he proves to be guilty, and any defendant as against whom the proof fails is entitled to a verdict." 1 Black, Judg., sec. 207, and cases there cited. And the action may be maintained against one or both parties liable in tort. Cooley, Torts, 142. It is true some courts hold to the contrary, but the best reasoning seems to support the view here taken. This court held that the proof failed to show that the defendant, the New Mexico & Southern Pacific Company was guilty, and ordered a reversal and dismissal of the case, but declined to disturb the verdict or judgment against the codefendant. For the reasons above stated the order of the lower court, directing the receivers to pay the plaintiff, Madden, the amount due him on the judgment entered in his favor, is affirmed.

SMITH, C. J., and HAMILTON, J., concur.

[No. 606. October 16, 1895.]

FRANCIS X. EBERLE, PLAINTIFF IN ERROR, v. WILLIAM CARMICHAEL ET AL., DEFENDANTS IN ERROR.

MINING CLAIM—OWNERSHIP OF ADJOINING MINES IN COMMON—SUFFICIENCY OF CLAIM.—When several adjoining mining claims are held in common, work done upon any one of them, in a given year, for the benefit of all, equal in amount to that required to be done upon all, is a sufficient compliance with the mining laws of the United States.

ID.—CLAIM OF PRIOR LOCATION—EJECTMENT—EVIDENCE—JURY TRIAL.—In ejectment for the recovery of three adjoining mines against persons claiming under a location made prior to a conveyance to plaintiff, where there was evidence of an oral agreement between plaintiff and two others that all mines located in the name of either should be owned by all in common, and three adjoining mines were located, one in the name of each, and an amount of work for the benefit of all was done on one mine, equal to that required by the mining laws to be done on all, and the interest of the others was conveyed to plaintiff, he was entitled to have the question of his ownership submitted to the jury.

ID.—OWNERSHIP OF ADJOINING MINES IN COMMON—LOCATION NOTICE, VALIDITY OF.—Where the names of three persons claiming to hold three adjoining mines in common did not appear on each location notice,—Held: That the legal title was in the locator named for each mine, and the others had such interest with him as constituted a holding in common, under the mining law, to the extent of making work done on one mine for the development of the three satisfy the law, when sufficient in quantity and value.

ERROR, from a judgment for defendants, to the Fourth Judicial District Court, Socorro County. Reversed; LAUGHLIN, J., dissenting.

The facts are stated in the opinion of the court.

THOMAS B. CATRON for plaintiff in error.

H. L. PICKETT for defendants in error.

COLLIER, J.—This was an action in ejectment brought on October 26, 1893, by plaintiff against defendants, for the possession of three mines situate in the Cooney mining district, in the county of Socorro, New Mexico, called the Clifton, Lexington, and Andrew Jackson. Defendants pleaded not guilty only,—put in no special plea,—and the court directed, verbally, a verdict for plaintiff for the Clifton Mine, and a verdict for the defendants for the Lexington and Andrew Jackson mines. On that verdict, judgment was entered for plaintiff for the possession of the Clifton Mine, and against the plaintiff as to the Lexington Mine, and as to five sixths of the Andrew Jackson Mine, and in favor of plaintiff for one sixth of the Andrew Jackson Mine, which last was entered on a stipulation of consent of the defendant Adam Hugg. The plaintiff, on the entering of such judgment, made motions for new trial, and in arrest of judgment, both of which were overruled, and he has brought the case into this court by writ of error. The testimony tended to show that an oral agreement was made in the year 1878 or 1879 be-

tween John E. Eberle, for himself, and as agent of F. X. Eberle and Langford Johnson, that said John E. Eberle and Johnson would prospect for, and locate, mines in Arizona and New Mexico, and that all mines located in the name of either should be owned in common by the three; F. X. Eberle to furnish the necessary means to develop and hold said mines under the mining laws of the United States. Subsequent to this agreement the Clifton Mine was located, on May 26, 1879, in the name of Johnson, and on October 3, 1881, the Lexington Mine, in the name of John E. Eberle, and the Andrew Jackson Mine, in the name of the plaintiff, F. X. Eberle. The location notice of the Lexington was recorded in May, 1879, and that of the other two in December, 1881. The three mining claims lie adjacent,—that is to say, the Lexington abuts the Clifton on the north, and the Andrew Jackson abuts the Lexington on the north,—making a continuous vein or lode, extending nearly four thousand five hundred feet in length for the three. On April 5, 1887, Johnson executed an instrument purporting to convey to John E. Eberle his interest in said three claims, reserving one eighth of the proceeds of the sale thereof, which instrument was filed in the county recorder's office on April 20, 1887. John E. Eberle conveyed all his interest in the three claims to F. X. Eberle, the plaintiff, on December 26, 1889; acknowledgment being made before a notary public on January 4, 1890, and the instrument recorded in the county recorder's office on January 9, 1890. There is testimony tending to show that John E. Eberle had, prior to this time, conveyed the same interest to F. X. Eberle, but the instrument of conveyance was lost, without ever having been recorded. The location notice, as recorded, is as follows:

"Notice of Location. Territory of New Mexico, County of Socorro,—ss.: Know all men by these pres-

ents, that John E. Eberle, the undersigned, citizen of the United States, has this 3rd day of October, 1881, claimed, by right of discovery and location, and does hereby claim, by virtue of such right, 1,500 feet, linear and horizontal measurement, in length, and 300 feet in width on each side of the middle of the vein on this lode, vein, ledge, or deposit, along the course of the same, with all its dips, variations, and angles, together with the amount of surface allowed by law. This said lode, vein, ledge, or deposit hereby located and claimed as aforesaid is situated in Cooney mining district, Socorro county, territory of New Mexico, and is bounded and described as follows, to wit: Commencing at monument where notice is posted, and running northerly direction 1,500 feet. Corners all marked as required by law. Situated about 1,500 feet north of Silver creek. Bounded on south by the Clifton Mine; on the north by the Andrew Jackson Mine. The same vein, ledge, or deposit so located is the Lexington Mine, discovered October 3rd, 1881. Located October 3rd, 1881. John E. Eberle, Locator.

"Witnesses: L. JOHNSON,
"J. W. FOSTER,
"Lexington Mine.
"JOHN E. EBERLE, Locator."

The Andrew Jackson location notice is in the same language, with description as follows: "Commencing at the north end center monument of the Lexington Mine, and running 1,500 feet in a northerly direction, to a monument of stone, with all corners marked by substantial monuments of stone, according to law, and is bounded on the south by Lexington Mine, about one half mile south of Mineral creek." The testimony tended to show that on the Clifton Mine, located in 1879, annual work was done on the lode, down to and including the year 1882, and upon each of the other mines for the years 1881 and 1882, and that subsequent

to 1882 work was done every year upon the Clifton, in a tunnel, up to the time of commencing this suit. There was also testimony that down to the time that Johnson conveyed his interest, reserving one eighth in the three mines, the work was done by the means furnished by F. X. Eberle, and the joint labors of the other two and their employees, and that on February, 1889, an employee of John Eberle sank a shaft on the Lexington, to a depth of about twelve feet, at an expense of $10 per foot. There is some evidence tending to show that the purpose of the tunnel upon the Clifton Mine was for the developing and holding of it and the other three claims, and that such work did so tend, and would, in all likelihood, result in such development, if said tunnel were sufficiently extended. The testimony shows that shafts were sunk on the lead in each of the three mines at the time of location. Also, there was testimony tending to show that the defendants were notified, prior to their going upon the mines, that the tunnel on the Clifton was for the purpose of developing the three mines. There was, also, testimony showing a purchase by plaintiff from Adam Hugg, one of the defendants, of his interest in the three mines, and a contract accompanying the purchase, setting forth that the same was made by plaintiff, while expressly disclaiming any acknowledgment of interest in Hugg, but for the purpose of removing a cloud upon plaintiff's title. It was shown, also, that Hugg located, in 1888, the Consolidated Mine, so as to conflict with the Andrew Jackson location.

We deem it unnecessary to comment on the evidence submitted by the plaintiff as to there being an oral agreement between him and John E. Eberle and Langford Johnson for a location and development of mines for the benefit and co-ownership of the three; of work being prosecuted in furtherance of said agreement; and of a tunnel being run on the Clifton Mine,

intended, and reasonably tending, to develop the three mines. The testimony on these points, being uncontradicted, was sufficient to carry plaintiff's case to the jury, if, in law, he had a locus standi. As to this, we will proceed to discuss.

It seemed to appear to the court below that a case had been made out in plaintiff's favor so completely, as to the Clifton Mine, that the jury were instructed that, as to it, they should return a verdict in plaintiff's favor. It is to be observed that, if plaintiff was entitled to recover as to the Clifton Mine, it was not because of the original location being in his name; for, as a matter of fact, it was located in the name of Langford Johnson in 1879, and by subsequent conveyances the title came into plaintiff, it being first conveyed to John E. Eberle, and by him to plaintiff. It also seemed to be the theory of the court below that it was beyond dispute that the tunnel upon the Clifton Mine, whatever might be said about its tending to develop the Lexington and Andrew Jackson Mines, was at least annual work, under the law, on the Clifton, sufficient to render unimpeachable plaintiff's possessory right. We have said that in our opinion the tunnel work on the Clifton should be considered as work done for, and having a tendency toward, development of it and the other two mines, and that the evidence in that regard was sufficient to go to the jury. It is well settled that, when several adjoining claims are held in common, work for the benefit of all, done upon any one of them, in a given year, to an amount equal to that required to be done upon all, meets the requirements of the mining laws of the United States. Smelting Co. v. Kemp, 104 U. S. 636; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350.

OWNERSHIP of adjoining mines: in common: sufficiency of claim.

Let us inquire, then, what is plaintiff's status as to the other mines. We will consider first the case of the

CLAIM of prior location: ejectment: evidence: jury trial.

Lexington Mine. This mine was located in 1881 in the individual name of John E. Eberle, who conveyed to the plaintiff, by deed duly recorded, on January 9, 1890. The status of that mine, then, seems to be that, if the parol agreement respecting the location and working of mines was not effectual to vest an interest in F. X. Eberle and Johnson, then John E. Eberle had the entire interest, if any at all, by virtue of the location in 1881, and, if said agreement was so effectual, he was vested with a two thirds interest subsequent to the Johnson conveyance, in 1887; and, in either event, plaintiff acquired by the conveyance of 1890 the entire interest in the Lexington Mine, the question of that interest being preserved being hereafter considered. It also appears that, inasmuch as the Lexington Mine abuts on the Clifton, the Clifton tunnel could be deemed, if it and the Clifton were held in common, as tending to develop the Lexington, even if the Andrew Jackson, which abuts on the Lexington, should be considered as the property of strangers. There is some testimony to the effect that in the spring of 1889 one James House located ground that conflicted with the Lexington location; but it is of so slight and so vague a character that it should not be considered as militating against plaintiff's right to go to the jury, if, as a matter of fact, plaintiff acquired, by instruments of conveyance, the prior interest or interests in that mine. If plaintiff had acquired the entire interest in both the Clifton and Lexington Mines, then the work subsequent to January, 1890, done on the tunnel, having, as we have said the testimony tends to show, the purpose and tendency to develop both, it was work for the two mines held in common, if they were so held. It is admitted in the brief for defendants in error that this work was done continuously every year on the Clifton tunnel. It appears, therefore, that the court erred—so far, at least,

as the Lexington mine is concerned—in directing a verdict for the defendants, if these mines were held in common. If the House location was in fact made, and made prior to January, 1890, what we hereafter say in this opinion in reference to the Adam Hugg location of the Consolidated Mine, so far as the Andrew Jackson is concerned, will apply to the House location, as conflicting with the Lexington Mine, as well as what we say about the mines being held in common.

The Andrew Jackson Mine occupies a somewhat different status from that of the Lexington, in that it appears by undisputed testimony that in 1888 the Consolidated Mine was located so as to conflict with the Andrew Jackson. It also seems to be true, beyond question, that a valid location could have been initiated at the time by Adam Hugg, unless the Andrew Jackson, Lexington, and Clifton Mines were held in common, first by the two Eberles and Johnson, and subsequently by the two Eberles, and the tunnel work was done, and had the purpose and tendency to devolop the three mines. We being satisfied, as already remarked, that such tunnel work was done, and had such purpose and tendency, or that it sufficiently so appears for the purposes we here have, we are left to consider whether or not the three mines were held in common. The fact that the location was in the name of F. X. Eberle alone can not, in this inquiry, be considered, because it conclusively appears that the annual assessment work upon this mine by him, as sole locator, was not kept up, as required by law, to preserve his rights. It is certainly true, however, that if these mines were held in common, and this tunnel work contributing to the development of the three was done by the co-owners with that purpose, and was continuous, and sufficient in value for the three, the location of the Consolidated Mine was void, so far as it conflicted with the Andrew Jackson. The question then is, were they held in common at

that date, or, rather, does the testimony make out a prima facie case in this regard. In the case of Book v. Justice Mining Co., 58 Fed. Rep. 108, it appears that the defendant was the owner of a patented mining claim, and procured three of its employees to locate in their own names, and at the expense of, and for the benefit of, the defendant, two mining claims contiguous to their patented mine, one of the claims being located in the name of one employee, and the other in the names of two other employees. While these mining claims still remained in the names of the locators, the plaintiff located a claim conflicting with one of them, and soon afterward said employees conveyed to defendant company. Prior to the conflicting location of plaintiff, defendant began the construction of a tunnel for the prospecting and development of the mining claims located by its employees. Title in the mining company was held good. That case seems on all fours with the case at bar, except that the oral agreement here was for the joint benefit of the locators, while in Book v. Justice, supra, it was not for the benefit of the locators themselves, but for defendant. A fortiori, it would seem that the locator could locate for the joint benefit of himself, if he can locate for the benefit of another, who is to bear the expense. Also, it would appear that if it is a holding in common between one and another, for whose benefit and at whose expense the one locates, there is much more reason for saying that there is a holding in common between two for whose joint benefit different locations are made. Yose v. McBrayer, 18 Cal. 582; Montz v. Lavelle, 18 Pac. Rep. (Cal.) 803; Hiboun v. Reeding, 3 Mont. 13; Murley v. Ennis, 2 Colo. 300. It has often been held that an oral agreement for the location of a mine for the benefit of the locator and others is not within the statute of frauds. See cases last cited. The question of thus creating merely an equitable title, and therefore not sufficient to maintain a suit in ejectment,

can not, we think, avail here, if it should avail at all, for two reasons: One reason is that, so far as the Jackson Mine is concerned, if the legal title was not, at the time of the location of the Consolidated Mine, in the two Eberles, it was in the plaintiff, as locator, who had preserved his rights by work done for the development of the claims held in common; and, second, the legal title, as to both the Lexington and Andrew Jackson Mines, had been conveyed to plaintiff at the time this action was begun. Whatever our statute might be construed to mean, as to location, we think it certainly true that it can not produce the result that an oral agreement for such location of mines for the joint benefit of the locator and others does not make a holding in common of all the mines, which, if contiguous, may be developed by work begun on one of the mines, or even off of all of them, if intended for and reasonably contributing thereto, as this would be to override an act of congress. Such statutes must be construed in subordination to the laws of congress, as they are more as regulations under those laws than independent legislation. In Murley v. Ennis, supra,—a Colorado case,—it is seen that local statutes have not the effect contended for; the Colorado statutes embracing, as does ours, mining claims under the head of "Real Estate," and real estate being conveyed by deed. So regarding them, we attach no significance to the requirement of our statute (Comp. Laws, sec. 1566) that the names of the locators must be recorded, as they can not modify congressional legislation as to a holding in common.

The only remaining question we deem it necessary to notice is as to whether there was a valid location of the Lexington and Andrew Jackson Mines. The only attack made on the validity of location which appears to be strongly pressed on this court is that the names of three persons claiming an interest in each mine located should have appeared on each location notice. As

OWNERSHIP of adjoining mines in common: validity of location notice.

to this, however, it is replied that, in our opinion, the legal title was in the locator named for each mine, but the others had such interest with him as constituted, under the mining laws, a holding in common, to the extent, at least, of making work done for development of the three satisfy the law, if sufficient in quantity and value. It makes no difference whether the interest of the one other than the locator may be inchoate or equitable. The statute in reference to co-owners does not, we believe, necessarily mean those who are vested with the legal title. In holding this, we do not go to the length of the decision in Book v. Justice Mining Company, supra, and follow the principle in the causes we have cited.

Our conclusions, summarized, are as follows: (1) The location of the Lexington and Andrew Jackson Mines are prima facie valid, and the parol agreement establishing (locations being made in pursuance thereof) a holding in common was sufficiently proven for a jury to pass upon same. (2) The work in constructing a tunnel beginning on the Clifton Mine was sufficiently shown, as to purpose, tendency, continuity, and value, to make a prima facie case for the jury to consider. (3) There was such a prima facie case made, under the above heads, as would authorize a submission to the jury under proper instructions as to whether the locations upon the Lexington and Andrew Jackson Mines were void or not. For these reasons it is ordered and adjudged that the ruling of the court below in instructing the jury to return a verdict for the defendants as to said mines was error, and that it be set aside; that said verdict be set aside, and that a new trial be granted to plaintiff in error; and that said court be and is hereby directed to place this cause on the calendar for trial as if it had never been tried.

SMITH, C. J., concurs. LAUGHLIN, J., dissents.

[No. 625. October 18, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JOHN M. LEARY, APPELLANT.

CRIMINAL LAW—APPLICATION FOR CHANGE OF VENUE—AFFIDAVIT—CONSTRUCTION OF STATUTE—JUDICIAL DISCRETION.—Under chapter 77, Laws of 1889, requiring that, in a criminal case, the defendant's affidavit for change of venue shall "be supported by the oath of two disinterested persons that they believe the facts therein stated are true," the court may, in its discretion, require defendant to produce in court the persons making such affidavit, to be examined orally under oath.

ID.—CONTINUANCE—JUDICIAL DISCRETION.—The granting or refusal of an application for a continuance is a matter resting in the sound discretion of the trial court, whose judgment will not be disturbed, where there has been no abuse of that discretion.

APPEAL, from a judgment of the Second Judicial District Court, Bernalillo County, overruling a motion for a change of venue, on the ground of local prejudice. Affirmed.

The facts are stated in the opinion of the court.

JOHNSTON & FINICAL and WARREN, FERGUSSON & GILLETT for appellant.

Chapter 77, Laws of 1889, providing that, in criminal cases, the defendant's affidavit for change of venue shall "be supported by the oath of two disinterested persons that they believe the facts therein stated are true," is peremptory, divesting the trial court of all discretion in the matter, where the party making the application has fully complied with its requirements. Territory v. Kelly, 2 N. M. 292.

The record shows no counter affidavits, nor any effort to impeach the affidavits or oaths of either the defendant, or his supporters, required by the statute; and the decision of this court in Territory v. Kelly,

supra, is uniformly sustained by the decisions of other jurisdictions. Higgins v. Com., 21 S. W. Rep. 231; Clark v. People, 1 Scam. 117; Barrows v. People, 11 Ill. 121; Brennan v. People, 15 Id. 511; Reed v. State, 11 Mo. 379, 382, 383; Edwards v. State, 25 Ark. 444; Krutz v. Howard, 70 Ind. 174. See, also, State v. Turlington, 15 S. W. Rep. (Mo.) 141; Donovan v. People, 28 N. E. Rep. 964.

In most of the states, in order to force a defendant to trial, the opposing counsel must not only admit that absent witnesses will swear to certain facts, but they must also admit the truthfulness of those facts, and are absolutely precluded from disputing them. People v. Diaz, 6 Cal. 248; People v. Brown, 54 Id. 243; De Warren v. State, 29 Tex. 464; Wassels v. State, 26 Ind. 30; Powers v. State, 80 Id. 77; Willis v. People, 1 Scam. 399; Freleigh v. State, 8 Mo. 606; Cass v. State, 2 Green (Iowa), 353. See, also, Rapalje's Crim. Proc., sec. 175; Dominges v. State, 15 Miss. 475; Goodman v. State, 1 Meigs (Tenn.), 195; State v. McLane, 15 Nev. 345.

JOHN P. VICTORY, solicitor-general, and WILLIAM H. POPE, assistant to solicitor-general, for territory.

The court's decision in overruling the motion for change of venue was in accordance with the law and the exercise of a sound discretion. Laws 1889, chap. 77.

The motion for a continuance was addressed to the sound discretion of the trial court, and its refusal to grant the same is not reviewable, except in case of gross abuse of discretion. Territory v. Kinney, 3 N. M. (Gil.) 143; Territory v. Anderson, 4 Id. (Gil.) 213; Faulkner v. Territory, 6 N. M. 465; Territory v. McFarlane, 7 Id. 421; Territory v. Yee Dan, Id. 439; State v. Howell, 23 S. W. Rep. 263, where it was held that every reasonable presumption should be indulged in

behalf of the action of the trial court in refusing a continuance.

The overruling of a motion for new trial is a matter of discretion, and not reviewable. Buntz v. Lucero, 7 N. M. 219; Territory v. Webb, 2 Id. 156; Territory v. Romero, Id. 475.

BANTZ, J.—The defendant, under indictment charging assault with a deadly weapon, filed his affidavit on the ninth day of November, 1894, for a change of venue, on the ground that he could not secure a fair trial in Bernalillo county, where the case was pending, because the principal witness for the territory had an undue influence over the minds of the inhabitants of the county; that the inhabitants of the county were prejudiced against him; and that, by reason of local prejudice, an impartial jury could not be obtained. This affidavit was supported by the affidavits of two persons, who set forth that they had no interest in the case; that they had read the affidavit of defendant; and that they believed the facts therein stated to be true. The application for a change of venue was resisted upon the ground that the two persons supporting the defendant's affidavit should come into open court, and submit to an oral examination under oath. On the same day, November 9, the court overruled the application, but at the same time gave the defendant leave to produce in open court two disinterested persons to verify the facts set forth in defendant's affidavit. On the twelfth of November, the defendant filed another motion for change of venue, based upon the affidavits already mentioned; and on the same day it was ordered by the court that "the said defendant not having produced in open court two witnesses to verify the truth of the allegations contained in said motion," the same is overruled. The record fails to disclose that any exception was taken to the action of the court below as to these orders overruling motions for change of

venue, but the prosecution and the defense have fully argued the question, and, as it is one of practice and of great importance, we have considered the point without deciding whether it is sufficiently raised on the record. The affidavits of the defendant and of the two persons supporting it fully set forth all that the statute requires; and the question is whether the court below erred in requiring the two witnesses supporting defendant's affidavit to personally appear in open court, and submit to an oral examination.

The statute requires that a defendant's affidavit shall "be supported by the oath of two disinterested persons, that they believe the facts therein stated are true." It will be noted that, under this clause, two things should appear to the court: (1) That two persons must state under oath that they believe the statements in defendant's affidavit to be true; and (2) it must be shown in proof that such persons are disinterested; that proof is not necessarily confined to their testimony alone or at all. It will also be noted that, while the statute directs the defendant to set forth the grounds for the change of venue in an "affidavit," the supporting proofs are to be made under "oath" by disinterested persons. The statute does not say that such oath shall or even may be by affidavit, and in that respect this case is to be distinguished from Cass v. State, 2 G. Greene, 353. It would probably be true that, if the affidavits of these persons had been received and considered as proofs, the court would not have been permitted to arbitrarily disregard them. Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50; Territory v. Kelly, 2 N. M. 300. But it is manifest from the orders made on the ninth and twelfth of November that the court did not consider the proofs as competent, but required them to be made orally in open court. Even assuming that the bare oral statement under oath by the persons

APPLICATION for change of venue: affidavit: construction of statute: judicial discretion.

so produced as to their belief in the truth of the defendant's affidavit would have fully satisfied the statute in that particular, still the question as to whether they were disinterested was one upon which they were subject to full and searching examination. The right to use ex parte affidavits as proofs in any case is a mere matter of grace and convenience, unless some statute or rule of court provides otherwise in a given case; and the court would have the undoubted right to require the proofs upon a motion to be presented orally in open court. We are not to be understood as holding that proofs upon motions made in the form of affidavits would not be ordinarily sufficient for purposes of review in this court, but we do hold that the license which has grown up in the use of ex parte affidavits has not ripened into a right to employ them where the trial court expressly requires the proof to be oral in open court. In requiring this, the court did not deprive the defendant of any rights conferred by statute or common law or rule of court; and it was not in anywise unjust or unreasonable. The legislature, in the very terms of the statute, distinguishes between the "affidavit" of the defendant and the "oath" of the disinterested persons, and we can not say that the legislature did so inadvertently. No man with a proper regard for the obligation and solemnity of an oath would swear in private to that which he would not swear to in open court, and requiring the oath to be made openly and publicly did not deprive the defendant of any just right. The statute does not say that the proofs in support of defendant's affidavit may be made by the oath of any person, but requires that such persons shall be "disinterested." Who is to determine whether the persons offered are disinterested? There can be but one answer, —the court alone. If the persons offered as disinterested can by their mere ex parte affidavit close the door against their own examination upon that point in open

court, notwithstanding the trial court requires it, a thing so extraordinary could only be justified by the clear terms of the statute or rule of court, and there is none. The ease and facility with which change of venue is taken, often to the great delay of causes, the defeat of justice, and the hardship of witnesses, does not require us to construe the change of venue law beyond its plain terms and the full and efficient protection of the defendant in a fair and impartial trial. In Territory v. Kelly, supra, the defendant attempted to change the venue from Santa Fe county, and also set forth that the same causes existed against San Miguel, and it was urged that the law which made the proofs conclusive against Santa Fe county also made them conclusive against San Miguel; but the court held that, while the statute allowed no discretion in the one instance, it imposed no limitations upon the discretion of the trial court in the other. So here, while law makes the oath of two disinterested persons conclusively sufficient in support of defendant's affidavit, the court is invested with a discretion in ascertaining whether such persons are disinterested. For the purposes of this case, it will be unnecessary to determine whether the legislature used the word "disinterested" in the narrow sense, distinguishing between persons qualified and those disqualified at common law from testifying, or whether it used it in the broader sense, as synonymous with "fair-minded" and "impartial." The statute was passed long after the legislature had swept away the disqualification of witnesses arising from interest, and it may well be that the rule laid down in Freleigh v. State, 8 Mo. 607, would not apply, but that, construing the statutory expression in the light of the present condition of the law as to the qualifications of the persons testifying (Suth. St. Const., sec. 247), we should consider the legislative intent to be that those whose oaths were to inform the court and set in motion judicial action should

be indifferent to the cause in the broader sense of being impartial and fair-minded. Warren v. Baxter, 48 Me. 194; Insurance Co. v. Stevens, 48 Ill. 33. In Wakefield v. State, 41 Tex. 553, the statute used the word "credible person," and the court held that the inquiry involved more than a general character for truth, but embraced the means of knowledge, the intelligence, and the relations of such persons with the defendant. This matter does now, however, enter into the decision of this case. It is sufficient to say that the defendant had no right to insist upon the reception of the supporting proofs, and as to the interest of the witnesses by affidavits, where the trial court expressly required them to be made orally, as already indicated; and it was not error to refuse the change of venue.

CONTINUANCE: judicial discretion.

The next point for consideration is whether the court below erred in denying the application for a continuance, which set forth that two certain witnesses would swear that the prosecuting witness used vile epithets toward the defendant, and threatened that he would "fix" the defendant, and that this occurred immediately before the assault charged. The application also sets forth that the defendant's attorney relied upon what he termed the hitherto customary and usual manner of granting changes of venue in cases made out on affidavits like the present one, and that, so relying, he did not issue subpoenas for witnesses who were then absent. It is probably true that it has been the customary practice to order the venue changed in cases where the showing has been made on affidavits like those in this case, and we would be strongly disposed to think it error if the refusal to grant the continuance had caused the defendant to suffer any material injury or disadvantage. The record, however, shows that the first application for a change of venue was made and refused on November 9; that on November 12 the motion was

renewed on the same affidavits, and again denied, and on the same day the application for a continuance was made, when the district attorney admitted that the witnesses would, if present, testify to the facts stated in the affidavits, and the court denied the continuance. The trial was begun the next day, the thirteenth, and one of the witnesses named in the affidavit testified at the trial for the defendant, but as to whether the affidavit as to the other witness was offered in evidence does not appear. Under these circumstances, we do not think error can be assigned on the refusal to grant the continuance. The defendant was deprived of the testimony of only one witness, whose testimony was only cumulative. The trial court necessarily has a discretion to exercise upon such an application, and it has been repeatedly and uniformly held by this court that, unless such discretion has been in some way abused to the injury of the defendant, the denial of a continuance will not be error. We have carefully considered the whole record, and find no error. The judgment will, therefore, be affirmed.

LAUGHLIN and HAMILTON, JJ., concur. The CHIEF JUSTICE was absent at hearing.

[No. 604. October 19, 1895.]

CELSO BACA, APPELLEE, v. DEMETRIO PEREZ, AUDITOR OF PUBLIC ACCOUNTS, AND RUFUS J. PALEN, TREASURER OF TERRITORY OF NEW MEXICO; TRANQUILINO LABADIE, INTERVENER, APPELLANTS.

TERRITORIAL LEGISLATION—VALIDITY—CONSTRUCTION OF STATUTES.—It was not the intention of congress, by the act of June 19, 1878, making appropriation for the compensation of territorial officers and members and officers of territorial legislatures, and providing that "no greater number of officers or charge per diem shall be paid or allowed by the United States to any territory," to prohibit the territorial leg-

islatures from employing others subordinate to those named in the act and providing for their payment out of the territorial treasuries, or to restrict them in the exercise of their discretion as to their necessities, but to limit the officers, to be paid out of the United States treasury, to those enumerated in the act. Braithwaite v. Cameron, 38 Pac. Rep. 1084.

ID.—ACQUIESCENCE BY CONGRESS—INFERENCE.—The territorial legislature having assumed and exercised for a series of years the right to engage additional subordinates, and congress having continuously acquiesced in its exercise, the approval of that body may be reasonably inferred. Cooley's Const. Lim. 34, note.

ID.—VALIDITY—CONSTRUCTION.—It is the duty of the courts to sustain legislative action, unless clearly satisfied of its invalidity.

APPEAL, from a judgment for complainant, from the First Judicial District Court, Santa Fe County. Reversed, and order entered dissolving injunction.

JOHN R. MCFIE and EDWARD L. BARTLETT for appellants.

H. L. WARREN, A. B. FALL, and W. B. CHILDERS for appellee.

SMITH, C. J.—The regular session of the thirty-first legislative assembly of the territory of New Mexico passed joint resolution number 5, and the same was duly approved by the governor on the twenty-fourth day of January, 1895. This joint resolution provided for the employment, and pay out of the territorial treasury, of subordinate officers and employees in and about the legislature, in addition to those provided for and paid under and by act of congress approved June 19, 1878. On January 25, 1895, the complainant, Celso Baca, filed his bill of complaint with the clerk of the district court of the First judicial district, at Santa Fe; and alleged that he was the owner of taxable property, and was a taxpayer resident, in the county of Guadalupe, in said territory of New Mexico, and that he brought this suit for himself and in behalf of all other

taxpayers of the territory; and prayed for an order restraining and enjoining the said defendant Demetrio Perez, as territorial auditor of public accounts, from auditing and issuing his warrants to any of said subordinate officers and employees provided for in joint resolution number 5, and to restrain and enjoin Rufus J. Palen, as territorial treasurer, from paying, out of any funds in his hands as such treasurer, any warrants so issued in payment of services performed by the subordinates, officers, and employees, as provided for in said joint resolution number 5; and further alleged that the legislative assembly had no power or authority to pass said joint resolution, for the reason that the same is in contravention of the constitution and laws of the United States. The court thereupon made a rule upon the defendants to show cause, if any they had, why an injunction should not issue as prayed for. In response to the rule, the defendants, by their legal adviser, the solicitor general of the territory, filed their answer, admitting the truth of the material allegations in the bill for the complainant, and the cause was submitted on bill and answer. On January 29, 1895, the court granted an order for an injunction restraining and enjoining the defendants, the auditor of public accounts and the territorial treasurer, as prayed for in the bill of complaint. Thereupon Tranquilino Labadie, as translator and one of the subordinate officers provided for in said joint resolution, appeared, and asked leave to file an intervening petition, to be made a party defendant in the suit, which leave was granted. Said Labadie thereupon filed a demurrer to the bill, and a motion to dissolve the injunction. The demurrer sets out that said complainant has not legal capacity to institute and sustain said suit; that the bill of complaint does not contain or set forth any matter of equity sufficient to authorize the injunction therein prayed for; that the court had not jurisdiction to

grant or issue said writ of injunction upon the matter alleged in said bill; that the said court had not jurisdiction to grant or issue the said injunction against the said defendants, the said auditor and treasurer, without this defendant, and other persons directly and materially interested in the object of said suit, being parties thereto; and that the said bill of complaint is insufficient in law to authorize or maintain the said writ of injunction. We will proceed directly to determine whether the legislature, in the exercise of its legal power, was authorized to supplement the officers provided for it by congress with employees of their own creation, and to pay them for their services out of the territorial treasury. A recital of the legislation establishing New Mexico, and of certain provisions of congress common to all the territories, is essential to an intelligent comprehension of the controversy. Section 7 of the organic act, approved September 9, 1850, enacts that "the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act." Section 1851 (approved September 9, 1850) of the Revised Statutes of the United States, applicable to all the territories, declares that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." By an act approved January 23, 1873, entitled "An act regulating the compensation of the members and officers of the legislative assemblies of the several territories of the United States" (section 1855 of the Revised Statutes), it was declared that "no law of any territorial legislature shall be made or enforced by which the governor or secretary of a territory or the officers or members of any territorial legislature shall be paid any compensation other than that provided by the laws of the United States."

TERRITORIAL legislation: validity: construction of statutes.

By the same act the subordinate officers of each branch of territorial legislatures are specified, and their compensation fixed. This provision (sec. 1861, Rev. Stat.) is as follows: "The subordinate officers of every branch of the legislative assemblies shall consist of one chief clerk, who shall receive a compensation of $8 per day; and of one assistant clerk; one enrolling clerk; one engrossing clerk; one sergeant-at-arms; one door keeper; one messenger and watchman, who shall receive a compensation of $5 per day during the sessions, and no charge for a greater number of officers and attendants, or any larger per diem shall be allowed or paid by the United States to any territory." An act approved June 19, 1878, entitled, "An act making appropriations for legislative, executive, and judicial expenses of the government for the fiscal year ending June 30, 1879, and for other purposes," repealed section 1861, differently entitling some of the subordinate officers, and reducing the compensation of some; but the restriction of said section 1861, to wit, "that no charge for a greater number of officers or attendants, or any larger per diem shall be allowed or paid by the United States to any territory," was reenacted in the words, "and no greater number of officers or charge per diem shall be paid or allowed by the United States to any territory."

It will be observed that the organic act did not specify the officers of the legislature, or their compensation. It did not inhibit payment, in addition to that allowed by the United States, either to the governor, secretary, members of the legislature, or its officers. Nor did any act of congress special to New Mexico, or common to all the territories, until January 23, 1873, forbid such appropriation of the territorial funds, or enumerate the officers allowed and to be paid by the United States. It is logical to conclude—as remedies are not provided, except to cure evils—that the legislators, in the exercise of their power, had regarded pay-

ment to themselves and their officers, and the officers of the other branches of the government, out of the territorial treasury, as rightful legislation, and that congress, though recognizing the power as existing, did not regard it legitimate for trustees of public funds to apply them to their own advantage, and imposed the restriction to prevent the continuance of such abuse; but it does not appear that further restraints as to the disposition of the territorial funds were deemed either essential or legitimate. Congress by the act of January 23, 1873, constrained due regard by public servants of their obligations by the prevention of the application of the funds in their custody to their own benefit, and notified the legislators that it would furnish certain officers, at certain compensation, and that no greater number, or greater charge per diem, would be paid or allowed by the United States. Neither the number nor the pay of the officers having been before specified, congress was bound by the acts of its authorized agents in their organization and operation; and it became imperative, consequently, to limit the liability of the United States for the expenses of these bodies. No limitations, however, upon the legislatures, were expressed either in the act of 1873 or that of 1878; and it is difficult, if not rationally impossible, to infer that, in exempting the United States treasury, congress simultaneously contemplated a protectorate over the fiscs of the territories. No legislation of this nature exists and it can not be created by judicial implication. If a casus omissus, the deficit can not be supplied by the courts. An intention, if, in the opinion of the court, entertained and not expressed by the legislature, is quod voluit non dixit, and can not be enforced. Courts can not assume the functions of legislatures. But, no matter what the status, congress, advising the territorial legislatures that only those officers authorized by it would be paid by the United States, warned them that,

if other persons were employed or appointed, they would not be recognized as claimants against the United States treasury, and no provision would be made for them. It may be said that congress served a caveat upon the legislatures, that at their own risk would they engage other subordinates than those enumerated; and it is submitted that a notice not to act is a recognition of the power, as a right, to act, where the right and power to restrain specifically exist in a superior, and is not exercised. Congress intended to forbid payment, other than that allowed by the United States, to the governor, the secretary, and members and officers of the legislature, and did it, unequivocally. It intended to limit the officers to be paid out of the United States treasury, and did it, distinctly. But did not clearly, or by logical implication, prohibit the employment of other subordinates, and provision for their payment, by the legislatures, and therefore the conclusion seems irresistible that they did not intend to restrict the legislatures in the exercise of their discretion as to their necessities. It may be readily conceived that congress, having furnished the aid it deemed essential, recognized it as wise not to interfere with the legislatures in further providing for themselves if necessity should develop. The legislatures of territories are, relatively, as absolute within their limits as are those of the states. The latter are restrained by their constitutions and the constitution of the United States; and the others, by the constitution of the United States, and the laws in pursuance thereof, which is but the constitution, in effect. Legislatures of the states are a law unto themselves, within the provisions of their constitutions; and, in their organizations, they are the arbiters of their wants. Legislatures of territories, though dependents and subjects of congress, are, except as restricted by the constitution, and the statutes applicable to them, unrestrained in their right to organize and

provide for themselves. Imposers of taxes, their disbursers, and absolute over them, except in the right to apply them to the increase of their compensation, or that of their officers and the officers of the other branches of the governments, it seems a sequitur too cogent to be denied that it is rightful that they should be permitted to provide themselves with the subordinates they may consider indispensable, or even contributive, to the satisfactory performance of their duties. Absolute in their control of public funds, to the extent of consigning them, in hundreds of thousands, to the construction of public buildings, capitols, penitentiaries, universities, asylums, and other institutions, they are yet, it is contended, estopped from the disbursement of but a trifle, relatively, that, in their judgment, is required for the execution of their trust. Such a deduction seems incompatible with sound reasoning. It is submitted that the correctness of the foregoing view has been demonstrated by the continuous action of congress. It is fundamental that congress, not rejecting territorial legislation, approves it, the corollary of the statute which requires the submission of the acts of the legislature to congress, and declares that "if disapproved they shall be null and of no effect."

Judge COOLEY, in his work on Constitutional Limitations (page 34, note), in regard to territorial legislation declares: "The legislation, of course, must not be in conflict with the law of congress conferring the power to legislate; but a variance from it may be supposed to be approved by that body, if suffered to remain without disapproval for a series of years, after being duly reported to it." The supreme court of the United States, in passing upon the Utah jury law, says: "The simple disapproval by congress, at any time, would have annulled it. It is no unreasonable inference,

TERRITORIAL legislation: acquiescence by congress: inference.

therefore, that it was approved by that body." Clinton v. Englebrecht, 13 Wall. 445. The same tribunal declares, "In a case of a doubtful and ambiguous law, contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect." Edward's Lessee v. Danby, 12 Wheat. 210; 107 U. S. 406. In the case of Lyons v. Woods, 153 U. S. 649, the supreme court of the United States placed the refusal to inquire into the organization of the twenty-fifth legislative assembly of New Mexico on the ground that the attention of congress was called to the circumstances of its organization. It is historical that the territorial legislatures have persistently pursued the practice of creating, for their service, subordinates, in addition to those named by congress; and being cognizant of this action, through the submission of their laws as required by organic acts, congress has not disapproved or condemned it; not denied the right, or censured its exercise, even if excessive. If wrong, it has been permitted to pass current as law by competent and controlling authority, and must be accepted as affirmation tantamount to congressional decree. Says the supreme court of the United States: "The simple disapproval by congress, at any time, would have annulled it (Utah jury law). It is no unreasonable inference, therefore, that it was approved by that body." Clinton v. Englebrecht, 13 Wall. 445. Acquiescence by a party who might have repudiated is ratification.

Again, the practice of congress in the premises must be regarded as its law upon the subject. Its acts indicate its intention, and are the construction of its enactments. "Usages long established and followed have, to a great extent, the efficacy of law, in all countries. They control the construction, and qualify and limit the force, of positive enactments." Slidell v. Grandjean, 111 U. S. 424. It must be conceded that

the custom of adding to their staff by the territorial legislatures has prevailed indefinitely, and without interruption, with the consent of congress, in that it has not dissented; and it has, consequently, obtained the force of law. Says Mr. Justice STORY, "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties." Were it admitted that the intention of congress in limiting the subordinates to be paid by the United States did not distinctly signify its purpose as to the right of the legislatures to increase them, and compensate them out of the funds under their control, it is palpable that in failing to disapprove such employment for a series of years, it established an undisputed usage, which must be regarded as its interpretation of its measure. Long and continued usage furnishes a contemporaneous construction which must prevail. Legislatures having assumed and exercised for a protracted period the right to engage additional subordinates, and congress having continuously acquiesced in its exercise, the construction has been practically declared, and doubt can not obtain. Reason and practice uniting in a conclusion, it would seem that it is impregnable.

But, for the sake of argument, let it be admitted that the construction of the statutes under consideration, notwithstanding the action of congress as above recited, is problematical. It is adjudicated that the constitutionality of a law is to be presumed, that reasonable doubts must be solved in favor of legislative action, and that courts should sustain it, when not clearly satisfied of its invalidity. Cooley, Const. Lim. In Fletcher v. Peck, 6 Cranch, 128, Chief Justice MARSHALL declared, "The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Mr. Justice WASHINGTON, in Ogden

TERRITORIAL legislation: validity: construction.

v. Saunders, 12 Wheat. 213, said, "It is but decent respect, due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt." If the legislature conceived any doubts as to the legality of its action, it solved them in its favor; and the courts, if sharing in such doubts, must similarly determine them. If such is the principle controlling courts in the construction of statutes generally, a fortiori must it prevail as to enactments personal to the legislatures, their organization, and requirements. Sole judges of the qualifications of their members, it would seem they are not less competent to settle for themselves the extent of their necessities, and the number of subordinates to meet them. It appears, then, that the right of the legislature to equip itself to its satisfaction is sustained by principle and practice, by congress and the courts. If the practice originated in error, congress is responsible for not correcting it, and the error has existed so long, and been so common, it must have the force and effect of law until legally corrected,—not by judicial legislation, however; not by the intrusion of courts into the portals of a co-ordinate department of the government, supreme in the exercise of authorized functions; but by congress, omnipotent over the legislatures, to control them, either enlarging or abridging their powers. In 12 How. 2, the supreme court says, "It seems to us that the control of these territorial governments appertains to that branch of the government which creates, and can change or modify them to meet its views of public policy, viz., the congress of the United States."

Ours is a government of co-ordinate departments, each, within its sphere, absolute, and exempt from supervision of the others; and the invasion of either,

within the domain of the other, is an infraction dangerous to the preservation of the genius of our institutions, and can not be tolerated. Better the abuse of power by one branch than the assumption of power by another. Courts are disposed to amplify their jurisdiction, even to the extent of encroaching upon the prerogatives of their co-ordinates, and, if not confined to their prescribed limits, would destroy the equilibrium of our political fabric by undue aggression. If injustice has been perpetrated by one department, less the evil of enduring it than the attempt to correct it by another arrogating to itself a province in derogation of fundamental doctrine. If it be permitted to the judicial department to revise the legislative, the one is subordinate to the other, its dignity less, and departures in contravention of our political tenets will be committed. If courts can, by construction, circumvent legislatures in organizing themselves, it will be difficult to impose a limit to interference by such methods. If courts can inject phraseology into statutes to impart an import unexpressed, serious complications will ensue. Legislatures create courts and judges, not to direct their actions, but to enforce their will; and they can not assume judicial functions to reform judicial abuses, but must cure them, either by the removal of the offenders by impeachment, or by legitimate legislation. The judiciary, jealous of their prerogatives, and zealous in their maintenance, should scrupulously abstain from infringing upon those of the associate departments, that each may move in its orbit harmoniously with the others. Excesses may be committed, even to the extremity of corruption; judgment may err, to the degree of folly; public interest may be sacrificed, to extent criminal,—by legislatures, in the exercise of their powers; but, nevertheless, it would be assumption for the courts to impugn their motives, or to assail the policy of their

acts, and usurpation of authority to attempt to restrain their discretion. Endowed with power, the legislatures of states are responsible to the people; of territories, to congress,—to whom they owe their existence, for its proper exercise; and the courts are estopped from inquiring into the wisdom of their action. It is primary principle that that system of law is best which confides as little as possible to the discretion of the judge; that judge the best who relies as little as possible on his own opinion.

This exposition of the relations of the departments of our government, if orthodox, is as true of the territories as of the United State and the states. Congress, in the exercise of its power to dispose of, and make needful rules and regulations, respecting the territories of the United States, created territorial governments, consisting of executive, judicial, and legislative departments, and conferred upon them general legislative power, and, in adopting the forms of the federal and state systems, incorporated with them the theories of such autonomies. In Clinton v. Englebrecht, 13 Wall. 443, it is said: "In all the territories, full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all." In the same case it is said, "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by congress." In Hornbuckle v. Toombs, 18 Wall. 665, it is said: "As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of

the entire system of municipal law,—subject, also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature." Congress, in deference to the spirit of our people, and to relieve itself, has endowed the territories with the right of self-government, and subjected them to but few restrictions. Authorized to legislate, it is inevitable that they shall determine upon the subjects for their action, within prescribed limitations; and it is consequential that, because they act, the subject is prima facie rightful. The executive can not dictate subjects, but may recommend them. The courts can do neither. Theirs is the function to administer the laws. "Rightful," as a qualification of "subjects of legislation," is a synonym for legitimate, and does not signify just, legislation,—legislation consonant to justice. A subject may be rightful, but legislation upon it may be wrongful, in that it may be in excess of power; in that it may transcend the limitations of the constitution and laws. It may be legal for a territorial legislature to consider a subject, but the enactment may be extra-jurisdictional; and the courts, without infringing upon the privilege of the legislature to elect its subjects, may declare that the limitations imposed by the constitution and laws have been disregarded. Says COOLEY: "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice, or not, in any particular case. The courts are not the guardians of the rights of the people, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is

by an appeal to the justice and patriotism of the representives of the people. If this fail, the people, in their sovereign capacity, can correct the evil, but courts can not assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It can not run a race of opinions, upon points of right, reason, and expediency, with the lawmaking power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

It can not be pretended that the resolution under consideration is any encroachment upon the powers apportioned to either the executive or judicial departments of the territorial government. It having been declared by the supreme court of the United States that the powers conferred by congress upon territorial legislatures, and exercised by them, are nearly as extensive as those exercised by state legislatures, it must be conceded that the foregoing law is not less the rule for the one than for the other. Both are practically absolute, within the prohibitions prescribed. Congress having bestowed upon the territorial legislatures powers but little less, if any, than those inherent in state legislatures, it follows that the said bodies occupy a relation to the other departments of territorial governments corresponding to that which has prevailed in the states since the foundation of the government. There has been no adjudication by the supreme court of the United States antagonizing this as the status of territorial legislatures, and decisions of subordinate tribunals in conflict must be regarded as erroneous. A court that, in construing the provisions of the organic law conferring power on a territorial legislature, applies the rules of construction applicable

to similar provisions in municipal charters, so conceives the nature of territorial legislatures that it logically adopts a rule of construction for territorial statutes more rigorous, less liberal, than for laws made by state legislatures, characterized as sovereign, though they do not possess the attributes of such supremacy. The supreme court of Arizona, in this assumption,—to be found in Territory v. Daniels, 22 Pac. Rep. 159, and Ellison v. Lindford, 25 Pac. Rep. 744,—enunciates an anomaly. The supreme court of the United States has not so degraded territorial legislatures, nor is there any decision of that august tribunal even faintly suggesting such inferior status for them. Territorial legislatures confer charters, create corporations. The charters involved in Territory v. Daniels and Ellison v. Lindford, 25 Pac. Rep. 744, were adjudged unconstitutional because, in the extension of corporate limits, lands miles from the town, and not advantaged, were heavily taxed, and private property was thus taken without compensation. Had the charters been granted by congress they would have been declared void, by similar adjudication, for the same reason. The supreme court of the United States, in Lindford v. Ellison, 155 U. S. 159, recited the facts and rulings of the cause of Ellison v. Lindford, in the court below, but did not approve the dicta contained, or pretend to consider them, and simply sustained the motion to dismiss for want of jurisdiction. It must be recognized that the supreme court would not inferentially recede from its position that the powers exercised by territorial legislatures are nearly as extensive as those exercised by the legislature of any state.

Imbued with the views we have enunciated, and endeavored to fortify by reason and authority, we have reached the conclusion that the power of the legislature to act for itself in providing subordinates in addition to those furnished by congress has not been restricted,

either expressly or by intendment, by any act of congress, and consequently that the joint resolution under consideration is an enactment within the power and discretion of the legislature, under the organic act, and can not be annulled by the courts. We beg to refer to the decision of the supreme court of Oklahoma (Braithwaite v. Cameron, 38 Pac. Rep. 1084) for a well-considered analysis of the acts to which we have referred, and a vigorous support of our conclusions. The judgment of the lower court is therefore reversed, and it is hereby decreed that an order dissolving the injunction granted shall be duly entered upon the journal of this court.

COLLIER, HAMILTON, and BANTZ, JJ., concur.

[No. 605. October 19, 1895.]

TERRITORY OF NEW MEXICO EX REL. GEORGE CURRY, DEFENDANT IN ERROR, v. DEMETRIO PEREZ, AUDITOR OF PUBLIC ACCOUNTS, AND RUFUS J. PALEN, TREASURFR OF TERRITORY OF NEW MEXICO, TRANQUILINO LABADIE, INTERVENER, PLAINTIFFS IN ERROR.

This cause involves the same questions, and is reversed for the same reasons stated in Baca v. Perez, decided at the present term, page 187, ante.

ERROR, from an order granting complainant's application for an injunction, to the First Judicial District Court, Santa Fe County. Reversed.

H. L. WARREN, A. B. FALL, and W. B. CHILDERS for plaintiffs in error.

EDWARD L. BARTLETT for defendant in error.

COLLIER, J.—The above action, in another form, involves precisely the same questions as were determined

in the equity suit of Baca v. Perez, decided at this term of the court. The reasoning in that case applies equally to this, and therefore no separate opinion is filed in this case, but for the reasons set out in the opinion in that case the present case will be reversed.

HAMILTON and BANTZ, JJ., concur.

[No. 620. October 21, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. ROBERTO FRIDAY, APPELLANT.

CRIMINAL LAW—MURDER—INDICTMENT—EVIDENCE—INSTRUCTION AS TO DEGREE NOT GIVEN.—On a trial, on indictment, for murder, if there is any evidence which can bring the case within the definition of any degree not given, it is the duty of the court, whether requested to do so or not, to charge the jury as to such degree, and a failure to do so is reversible error.

ID.—MURDER IN FIRST DEGREE—EVIDENCE—FAILURE TO INSTRUCT AS TO SECOND DEGREE.—Where, on a trial, on indictment, for murder in the first degree, defendant testified that deceased came to his room and abused him, that he left the room and went in search of the town marshal, that on his return shortly thereafter deceased was standing with another a few feet from the room, and, as defendant approached, rushed upon him, and defendant, retreating about ten or twelve feet, shot and killed deceased with a revolver he had borrowed when he went for the marshal,—Held, that the failure of the court to charge the jury as to murder in the second degree, was reversible error. Territory v. Young, 2 N. M. 93; Territory v. Romine, Id. 114; Territory v. Nichols, 3 Id. 103.

APPEAL, from a judgment of the First Judicial District Court, Santa Fe County, convicting defendant of murder in the first degree. Reversed and remanded.

The facts are stated in the opinion of the court.

FRANCIS DOWNS for appellant.

To constitute murder, death must have occurred within a year and a day from date of injury received.

In the indictment in this case, the death is not averred to have occurred within this limit; it is, therefore, fatally defective. State v. Mayfield, 66 Mo. 125; People v. Aro, 6 Cal. 207; People v. Kelly, Id. 210; State v. Lackey, 65 Mo. 217; State v. Tertermon, 68 Id. 408.

Under this indictment, the defendant might have been found guilty of any one of the three degrees defined by the statutes of the territory. The verdict is, therefore, fatally defective. Kerr on Law of Hom., sec. 542, and citations; Hogan v. State, 30 Wis. 428; Johnson v. Com., 24 Pa. St. 386.

"The court must submit to the jury the consideration of every degree of crime which the evidence tends to prove, and the exclusion of any grade is error, whether asked for by counsel or not, and warrants a reversal." Territory v. Nichols, 3 N. M. (Gil.) 103. See, also, Proff. on Jury Trs., sec. 328; 11 Cush. 417; 12 Ala. 764; 13 Ill. 17.

The jury, not the judge, is to determine credibility of dying statement. Wheat. on Crim. Ev., secs. 303, 276.

It was grave error for the court to refuse the eighth instruction asked by defendant. It was not shown that deceased was in expectation of immediate death, or that he was without hope of recovery. Thompson v. U. S., 155 U. S. 271; Hickoy v. U. S., 151 U. S. 303; Id. 262; Allen v. U. S., 150 U. S. 551; 153 Id. 183, 186.

JOHN P. VICTORY, solicitor general, for territory.

To charge a statutory crime properly, it is necessary only to set forth the terms of the statute, provided sufficient facts be alleged to put the defendant on notice of the charge against him. U. S. v. Gooding, 12 Wheat. 460; U. S. v. Britton, 107 U. S. 655.

The indictment charges "express malice aforethought." Section 2 of the law of 1891 defines malice

as "that deliberate intention," etc., and deliberate includes premeditated. State v. Dale, 18 S. W. Rep. 976.

So that the construction contended for might still be conceded without invalidating the indictment for a first degree conviction. 1 N. M. 279, 284; St. Clair v. U. S., 154 U. S. 134; Scott v. State, 20 S. W. Rep. (Tex.) 755; People v. Osmond, 33 N. E. Rep. (N. Y.) 739; Jordan v. People, 36 Pac. Rep. (Cal.) 218; People v. Hyndman, 33 Id. (Cal.) 782, and citations; Com. v. Buccieri, 26 Atl. Rep. (Pa.) 228; Weatherman v. Com., 19 S. E. Rep. (Va.) 778; Brannigan v. People, 24 Pac. Rep. (Utah) 765.

The testimony embodied in the record being fragmentary, it is a fair presumption that the court charged the jury correctly upon the evidence as a whole. Wheelock v. McGee, 1 N. M. 573.

If the territory's witnesses told the truth, the jury was constrained to convict of murder in the first degree; if the defendant told the truth, he was entitled to an acquittal. The court need charge only such degrees as the evidence tends to sustain. Territory v. Yarberry, 2 N. M. 392. See, also, Territory v. Young, 2 N. M. 93, 105; Territory v. Romine, Id. 114; Territory v. Romero, Id. 475; Territory v. Salazar, 3 Id. (Gil.) 321; Territory v. Fewel, 5 Id. 34; Territory v. Thomason, 4 Id. 154; Faulkner v. Territory, 6 Id. 464; Sparf et al. v. U. S., 156 U. S. 151.

"It is not error to refuse a charge when those given cover the case." Territory v. Anderson, 4 N. M. 213; Territory v. Edie, 6 Id. 555; U. S. v. De Amador, Id. 173.

The attempt to institute a comparison between the probative value of the dying declaration and the testimony of living witnesses is deprecated by the best authority. Bish. Crim. Proc., sec. 1216.

COLLIER, J.—It is deemed necessary to advert to only one of the alleged errors urged by appellant, and to recite the record and the evidence in the transcript so far as relevant to the same. The defendant was indicted for the murder of one Zenon Baca, found guilty in the first degree, and sentenced to be hanged. On the trial the court instructed only as to murder in the first degree, or acquittal. The testimony which it is claimed entitled the defendant to an instruction as to the second degree, was that given by appellant, and the material portions of it are hereinafter set forth. The testimony produced on the trial by the prosecution does not appear in the transcript brought to this court, and the question presented, therefore, is whether or not the court erred in omitting to instruct the jury as to the second degree of murder, and not whether the verdict of murder in the first degree was justified by the evidence.

Counsel for appellant contends that it makes no difference how strong, or even how overwhelming, may have been the testimony to support the verdict of the jury of murder in the first degree, that nevertheless the jury should have been instructed as to the second degree, if there was any testimony whatever to support such an instruction, and that to fail to give such an instruction was in effect telling the jury that defendant's testimony was to be altogether discarded from their minds, as not being worthy of any consideration. It is provided by our law that "in the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the courts of this territory, the person so charged shall, at his own request, but not otherwise, be a competent witness." Comp. Laws, N. M., sec. 2493. In this case the defendant testified in his own behalf, and, being a competent witness, his

MURDER: indictment: evidence: instruction as to degree not given.

testimony, its credibility and weight, were matters for the jury's exclusive consideration. We must look, therefore, to that testimony, to ascertain if, by itself and standing alone, an instruction as to murder in the second degree should have been given. If such testimony would support such an instruction, it becomes utterly immaterial whether the instruction was requested or not, as we believe the rule stated by PRINCE, C. J., in Territory v. Young et al., 2 N. M. 93, is the true rule, to wit: "The judge who excludes certain degrees from the consideration of the jury does so at his peril; that is to say, he should be absolutely certain that there is no testimony which would make a verdict of one of these degrees possible; for, if there is the least vestige of evidence, it is for the jury to determine its weight and effect, and the slightest mistake of that kind would be error, for which the appellate court would have to grant a new trial." In the case of Territory v. Romine, 2 N. M. 114 (opinion by PRINCE, C. J.), this court again said that, "if there is any evidence whatever which could bring the case within the definition of any degree not given, the limitation of the degrees in the charge to the jury would be error, which would be good cause for reversal." From the opinion of the court in the case of Territory v. Nichols, 3 N. M. 76, we make the following extract: "It is, we think, so well settled as to become almost elementary law that the court in its instructions to the jury in a criminal case must give to them all the law applicable to the evidence elicited at the trial. This, indeed, is the very purpose of instructions from the court, and it is only properly fulfilled when the jury retire to their room fully informed of the principles of law which are to govern them in considering the testimony. The law makes this the duty of the presiding judge, and he must perform it whether requested to do so or not. Suppose the evidence in a capital case pointed to a

particular degree of the crime as defined by the statute, and the presiding judge failed, through inadvertency or otherwise, to charge as to that degree, and the defendant was thereby prejudiced; can it be said that, because his counsel did not ask for instructions as to that particular degree, he can not avail himself of the error in the appellate court? We think not; and, as we have said already, we think the law on this subject is well settled. Bishop, in his work on Criminal Procedure, says: 'The charge should state the law in its application to the facts, as already explained, correctly and fully. If, for example, there are different degrees of an offense, the law of each degree which the evidence tends to prove should be given, but not of any degree which it does not tend to prove.' 1 Bish. Cr. Proc., sec. 980, and numerous cases cited." "It is error for the judge, unless there be an entire absence of evidence to prove a particular grade of murder, to exclude such grade from the consideration of the jury." Whart. Cr. Pl., sec. 713; McNevins v. People, 61 Barb. 307; Adams v. State, 29 Ohio St. 412. Our statute directs that "the court shall instruct as to the law of the case, but shall not comment on the weight of the evidence." Comp. Laws, N. M., sec. 2055. BELL, J., in Territory v. Nichols, supra, commenting on this provision of our law, says: "This statute, of course, can only mean that the court shall instruct the jury as to all the law applicable to the evidence in the case; and, this being so, a failure to do so would be error. The court is not permitted to wait until it is asked to charge as to a particular degree, but it must do so as a part of its duty in the case."

We reaffirm the views expressed as above by this court, and come to a consideration of the testimony of the defendant, to ascertain if in it there was any evidence tending to show any grade of murder other than the first. We think it clear that, if defendant's testi-

MURDER in first degree: evidence: failure to instruct as to second degree.

mony were believed by the jury, they could not, under proper instructions, have found him guilty of murder in the first degree. This testimony tends to show that deceased went to the house where defendant had a room; that he knocked at the door, and, on ascertaining that defendant was there, he began abusing him; that defendant closed the door which had been opened by the woman at whose house he was staying; that defendant dressed himself partially, and went up town to find the town marshal, and returned to his room in a short while; that deceased and another man were standing about ten feet from his room, and, as defendant approached, deceased rushed upon him, and defendant, retreating some ten or twelve feet, shot and killed him. He testified that he borrowed a pistol up town; that he had left a portion of his clothing at his room, and was returning there to sleep when the encounter took place as above detailed; that, after firing the shot, he went up town, and delivered himself up to the marshal. If the jury had even believed that defendant went up town for the express purpose of getting a pistol, instead of for the purpose of avoiding a quarrel with deceased, as defendant testified, and that on his return he was assaulted by deceased, and on retreating several steps he fired, that would not make murder in the first degree, unless they also believed that, instead of returning to his room to sleep, he came, after arming himself for the purpose of killing deceased, and that he made the supposed assault a pretext for the killing, instead of its being the occasion of his shooting under the impulse of sudden heat of passion, easily inflamed because of the previous abuse occurring at the time the two had met before the defendant had gone up town. The jury might also have concluded from defendant's testimony that the killing was perpetrated unnecessarily, while resisting an attempt by the deceased to commit an offense against the person of

defendant. There certainly was more than "a vestige of evidence" to support either of the above theories. Again, referring to the position of Chief Justice PRINCE in the case of Territory v. Romine, supra, and approving it, we say that, "if there is any evidence whatever which could bring the case within the definition of any degree not given, the limitation of the degrees in the charge to the jury would be error which would be good cause for reversal." And, believing that there is definite and distinct evidence in defendant's testimony calling for an instruction as to murder in the second degree, we are constrained to reverse the judgment of the court below refusing the defendant a new trial, and we direct that this case be remanded to that court, with directions to award such new trial; and it is accordingly so ordered.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

[No. 627. October 21, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JESUS VIALPANDO AND FELICIANO CHAVEZ, APPELLANTS.

CRIMINAL LAW—MURDER—KILLING BY BURNING, SUFFICIENCY OF INDICTMENT CHARGING.—Under the statute defining murder generally, and declaring that all murder which shall be perpetrated by means of poison, lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, etc., shall be deemed murder in the first degree, an indictment charging a killing by burning as being "felonious, unlawful, willful, and with express malice aforethought," is sufficient to sustain a conviction of murder in the first degree, without using the words "deliberate and premeditated," which are used in the statute as describing murder in the first degree in killings other than by poison, lying in wait, and torture.

ID.—MURDER IN FIRST DEGREE—REASONABLE DOUBT—JUSTIFIABLE HOMICIDE—INSTRUCTIONS.—Where the court did not, in terms, tell the jury that if defendants presented testimony, tending to show self-defense, such as would create in their minds a reasonable doubt of guilt, they must acquit, yet did, in effect, do so, by charging them as to what constituted justifiable homicide, in connection with its instructions upon reasonable doubt, and the necessity of the territory's proving every element of murder in the first degree, though error in not giving such instructions, was not prejudicial error.

ID.—MURDER IN FIRST DEGREE—FAILURE TO CHARGE AS TO SECOND DEGREE—TESTIMONY.—In such case, if the testimony tended to show murder in the second degree, it would be reversible error to have omitted an instruction on such degree (Territory v. Friday, 204, ante); but held, that the testimony did not disclose that such instruction should have been given.

ID.—CHANGE OF VENUE.—The overruling of a motion for change of venue, based on the affidavits of defendants' attorneys, was not error.

APPEAL, from a judgment of the First Judicial District Court, Santa Fe County, convicting defendants of murder in the first degree. Affirmed.

The facts are stated in the opinion of the court.

CHARLES A. SPIESS and WILLIAM H. POPE for appellants.

The affidavits and motion for change of venue in this case were made in compliance with chapter 77, Laws 1889. The statute is mandatory, and leaves no discretion with the court to whom the motion is addressed. 100 Ill. 464.

Confessions entitled to be admitted as evidence against a prisoner must appear affirmatively to have been made free from circumstances which involve duress, promises of assistance or threats, and the court erred in not requiring the prosecution to show that the first confessions were not made under such circumstances. Com. v. Cullen, 111 Mass. 435; Hopt v. People of Utah, 110 U. S. 574.

The defendant, Vialpando, testified that he and his codefendant, Chavez, killed deceased in self-defense.

If deceased was killed as related by Vialpando, unnecessarily, then defendants are guilty of murder in the second degree; but if done necessarily, they are not guilty, but were justified in taking the life of deceased (Session Laws, 1891, chap. 80, sec. 5. p. 150); and the court erred in not submitting the testimony to the jury under proper instructions. Territory v. Nichols, 3 N. M. (Gil.) 103; Territory v. Young, 2 Id. 274; Territory v. Romine, Id. 114; Territory v. Romero, Id. 474. See, also, McNevins v. People, 61 Barb. 307; Lane v. Com. 59 Pa. St. 374; Adams v. State, 29 Ohio St. 412; People v. Kelly, 35 Hun. 295; Nelson v. State, 2 Swan (Tenn.), 257; State v. Banks, 73 Mo. 592.

Where a homicide has been proven the presumption is that it was murder in the second degree, and the court erred in refusing to so instruct the jury. State v. Payne, 10 Wash. 545; State v. Cain, 20 W. Va. 679; Hill v. Coinn, 2 Gratt. 594; State v. Gassert, 65 Mo. 352; State v. Evans, Id. 574.

Although defendants relied upon the law of self-defense, and had no other defense, the court did not instruct the jury as to the law of self-defense, nor that if they found that defendants killed deceased in self-defense, they must acquit them. Such instructions should have been given, though not requested by defendants. Hinch v. State, 25 Ga. 699; Potter v. State, 85 Tenn. 88; Steinmeyer v. People, 95 Ill. 383; State v. Sneed, 91 Mo. 255; McConnell v. State, 22 Tex. App. 354; Elliston v. State, 10 Id. 361.

The record in this cause will not support the court in sentencing the defendants to death as guilty of murder in the first degree. Davis v. People of Utah, 151 U. S. 262; People v. Dowd, 19 Conn. 387.

The jury having failed to find the degree, the court can not assume that they intended the first degree rather than some other degree. Hogan v. State, 30 Wis. 428; Com. v. Johnson, 24 Pa. 386.

The degree of criminality must be found by the jury, upon common law principles, as well as statutory requirements. Dover v. State, 75 Ala. 40; Storey v. State, 71 Id. 329; Kendall v. State, 45 Id. 32; Cobia v. State, 16 Id. 781; Ford v. State, 34 Ark. 649; Neville v. State, 36 Id. 614; People v. Campbell, 40 Cal. 129; People v. Marquis, 15 Id. 38; State v. Moran, 7 Iowa, 236; State v. Huber, 8 Kan. 447; Tully v. People, 6 Mich. 273; State v. Upton, 20 Mo. 397; Parnish v. State, 18 Neb. 405; State v. Rover, 10 Nev. 388; Parks v. State, 3 Ohio St. 101; Dick v. State, Id. 89; McPherson v. State, 9 Yerg. 279; Slaughter v. State, 24 Tex. 410; Armstead v. State, 22 Tex. App. 51; McGuffie v. State, 17 Ga. 497; State v. Potter, 16 Kan. 80; Com. v. Herty, 109 Mass. 348; State v. Ryan, 13 Minn. 370.

JOHN P. VICTORY, solicitor general, for territory.

The affidavits presented by the attorneys for defendants on the motion for change of venue do not comply with the law. They show upon their face that the affiants were not disinterested persons. Sess. Laws, 1889, chap. 77, p. 183.

The court did not err in admitting the confessions before proof had been first made that alleged prior confessions were not made under duress or threats. Hopt v. People of Utah, 114 U. S. 488; State v. Guy, 69 Mo. 430; State v. Tatro, 50 Vt. 483. See, also, State v. Patterson, 73 Mo. 695, as to handcuffing prisoners at time of making confession, and Rufer v. State, 25 Ohio St. 464, as to burden of showing that the confessions were made by threats or improper inducements.

As to sufficiency of the indictment and sentence, see Territory v. Friday, decided at present term of this court.

As to charging in other degrees than first, the record does not embody any of the evidence given for the prosecution, and hence the presumption is that the court charged the jury correctly upon the evidence as a whole. Wheelock v. McGee, 1 N. M. 573.

The court did substantially charge the jury as to the law of self-defense in instruction number 16. "It is not error to refuse a charge when those given cover the whole case." Territory v. Anderson, 4 N. M. 213; Territory v. Edie, 6 Id. 555; U. S. v. De Amador, Id. 173.

The fact that the names of the defendants were not inserted in the verdict, does not render the verdict void for uncertainty. State v. Faulk, 30 La. Ann. 831; State v. Adam, 31 Id. 717; Cooper v. State, 20 S. W. Rep. 979. See, also, Algier v. Maria, 14 Cal. 170; Alhambra W. Co. v. Richardson, 72 Id. 598.

COLLIER, J.—The defendants were indicted for murder, tried, and found guilty. The verdict rendered was, in form, as follows: "We, the jury, find the defendants guilty as charged in the indictment." And it was construed by the court below as a verdict of murder in the first degree, and sentence of death was pronounced on it, after motion for new trial was heard and overruled. From alleged error in overruling the motion for new trial, the case comes on appeal to this court.

It is urged as one ground of error, that the indictment only charges murder generally, and not in such manner as to show murder in the first degree exclusively, and that, therefore, the verdict, finding defendant guilty as charged, does not necessarily import a finding in the first, or any other particular, degree. If this ground were well taken, it would seem strictly more proper for motion in arrest of judgment than by motion for a new trial. We will, however, treat the

question as properly raised, and, to its better understanding, we here set forth at large the indictment:

"Territory of New Mexico, county of Santa Fe. In the district court, at the special term A. D. 1895. The grand jurors for the territory of New Mexico, taken from the body of the good and lawful men of the county of Santa Fe aforesaid, duly elected, impaneled, sworn, and charged at the term aforesaid to inquire in and for the county of Santa Fe aforesaid, upon their oaths do present, that Jesus Vialpando and Feliciano Chavez, late of the county of Santa Fe, territory of New Mexico, on the twentieth day of January, in the year of our Lord, 1895, at the county of Santa Fe aforesaid, with force and arms, at the county aforesaid, in and upon one Tomas Martinez, then and there being, feloniously, unlawfully, willfully, purposely, and with express malice aforethought, did make an assault, and the said Jesus Vialpando and Feliciano Chavez certain guns and pistols then and there being charged with gunpowder and loaded with divers leaden bullets, which said guns and pistols the said Jesus Vialpando and Feliciano Chavez in their right hands then and there held against, at, and upon him, the said Tomas Martinez, then and there, feloniously, unlawfully, willfully, purposely, and with express malice aforethought, did discharge and shoot off; and that the said Jesus Vialpando and Feliciano Chavez, with the leaden bullets aforesaid, by force of the gunpowder out of the said guns and pistols by them, the said Jesus Vialpando and Feliciano Chavez, so as aforesaid discharged and shot off, him, the said Tomas Martinez, in and upon the left side of the head of him, the said Tomas Martinez, then and there, feloniously, unlawfully, willfully, purposely, and with express malice aforethought, did strike and wound, giving to him, the said Tomas Martinez, then and there, with the leaden bullets aforesaid, out of the guns and pistols so as aforesaid dis-

charged and shot off in and upon the left side of the head of him, the said Tomas Martinez, one mortal wound, of which said mortal wound the said Tomas Martinez then and there instantly died; and that the said Jesus Vialpando and Feliciano Chavez, then and there, feloniously, unlawfully, willfully, purposely, and with express malice aforethought, did take the said Tomas Martinez into both the hands of them, the said Jesus Vialpando and Feliciano Chavez, and did then and there, feloniously, unlawfully, willfully, purposely, and with express malice aforethought cast, throw, and push the said Tomas Martinez into a certain fire then and there burning, wherein there was a great quantity of wood, set fire to and caused to be burned and consumed by them, the said Jesus Vialpando and Feliciano Chavez, inflicting thereby, and by means of the flames thereof, upon the said Tomas Martinez, on his breast, belly, arms, legs, head, neck, and other parts of the body, divers mortal burns, sores and wounds, of which said mortal burns, sores and wounds the said Tomas Martinez then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid do say that the said Jesus Vialpando and Feliciano Chavez the said Tomas Martinez, in manner and form aforesaid, feloniously, unlawfully, willfully, purposely, and with express malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of New Mexico.

"J. H. CRIST,
"District Attorney for counties of Santa Fe, San Juan and Rio Arriba."

It appears from this indictment that death was effected in two different methods or ways—First, by shooting; and, second, by deceased's being cast and thrown upon a fire and burned; each distinct method being alleged as done "feloniously, unlawfully,

MURDER: killing by burning: sufficiency of indictment charging.

willfully, purposely, and with express malice aforethought." In form, the indictment is in one count, but it contains distinct and separate matter for two counts. Advantage might have been taken of this fact by demurrer for duplicity, but, instead, the trial proceeded with the only issue in the case made upon the plea of not guilty. Whatever might be said as to the indictment, so far as it charges death by shooting with guns and pistols, we think it clear that the portion containing, as we have said, distinct matter for a full and complete count, charges, in an exclusive way, murder in the first degree. Our statute defining murder generally says it is the unlawful killing of a human being with malice aforethought, express or implied, and it declares that all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, etc., shall be deemed murder in the first degree. It is to be noticed that to elevate any other murder to the grade at which "murder perpetrated by means of poison, or lying in wait, torture," is placed by our statute, the killing must be willful, deliberate, and premeditated. In other words, an unlawful killing of a human being, with malice aforethought, perpetrated by torture, is murder in the first degree, without other description, such as "willful, deliberate, and premeditated." The indictment in this case charges the killing by burning as being felonious, unlawful, willful, and with express malice aforethought. The words "deliberate and premeditated," used in the statute as describing murder in the first degree in killings other than by poison, lying in wait, and torture, are omitted. The only question, then, to consider, is whether or not a killing by burning, in the manner described, is one perpetrated by means of torture. Dr. Johnson defines "torture," other than torments judicially inflicted (which can not be the torture meant by our statute), to be pain, an-

guish, pang; and Webster defines it as extreme pain, anguish of body or mind, pang, agony, torment. As used in a Missouri statute prohibiting the torture of animals, torture was held to consist in some violent, wanton, and cruel act necessarily producing pain and suffering for the animal. State v. Pugh, 15 Mo. 509. The facts set forth, we think, necessarily import torture,—a recital of facts from which the law draws the conclusion of torture; and the omission of the statutory word "torture" can not, we think, vitiate the indictment. We therefore hold the contention of appellants on this point to be not well founded. If the indictment was framed with two counts, instead of one, the verdict should be construed along with the one that makes it intelligible and certain; and it being in the form it is, unexcepted to, a like result should follow.

MURDER in first degree: reasonable doubt: justifiable homicide: instructions.

Another error urged by appellants is the alleged failure of the court to instruct as to self-defense. The instructions of the court are very full on the question of first degree, or a verdict of not guilty; and the jury are admonished with precision and particularity as to the necessity of the prosecution's proving beyond a reasonable doubt every ingredient of that grade of murder. It is true that the court did not, in terms, tell the jury that, if defendants presented such testimony, tending to show self-defense, as created in their minds a reasonable doubt of guilt, they must acquit, he yet, in effect, so told them when, in connection with his instructions upon reasonable doubt, and the necessity of the prosecution's proving every element of murder in the first degree, he charged them what constituted justifiable homicide. It would be better, always, to give such instructions; but the error, for the reasons we have indicated, was not so prejudicial as to require reversal.

Another ground of error we will consider is the claim by appellants that an instruction as to second degree should have been given. If the testimony tended to show any such degree, it would be fatal error to have omitted such an instruction, whether asked by counsel or not, as we have just decided in the case of Territory v. Roberto Friday. A careful consideration of this testimony does not disclose that such an instruction should have been given. If the testimony had been believed, the jury would certainly have acquitted, but there was no possible middle ground between murder in the first degree and acquittal.

FAILURE to charge as second degree: testimony.

We do not think the court erred in overruling the motion for change of venue, based, as it was, on the affidavits of defendant's attorneys. The court held that they were not disinterested persons, and so do we. Finding no reversible error in the record, the judgment of the lower court is affirmed, and it is accordingly so ordered.

CHANGE of venue.

HAMILTON and BANTZ, JJ., concur.

[No. 621. October 23, 1895.]

TERRITORY OF NEW MEXICO, APPELLEE, v. SUSANO ORTIZ, APPELLANT.

CRIMINAL LAW—KNOWINGLY PURCHASING PERSONAL PROPERTY FROM OTHER THAN OWNER—INDICTMENT—PROOF—VARIANCE.—On indictment for knowingly purchasing personal property from one not the owner thereof, an allegation of ownership by two persons is not sustained by proof of ownership by one of them only.

APPEAL, from a judgment of conviction of defendant, from the First Judicial District Court, Santa Fe County. Reversed and remanded.

The facts are stated in the opinion of the court.

CATRON and SPIESS for appellant.

An indictment alleging that defendant "knowingly" purchased the property, but not alleging that he purchased it knowing that the person from whom he purchased had not the right to sell, does not charge the offense. U. S. v. Hess, 124 U. S. 483; U. S. v. Cruikshank, 92 Id. 542; U. S. v. Cook, 17 Wall. 168.

Proof of ownership must agree with the charge; thus, evidence of stealing property of one person will not support an allegation that the property belonged to two or more jointly. Owens v. State, 28 Tex. App. 122; State v. Burgess, 74 N. C. 272; State v. London, 3 S. C. 230; Blankership v. State, 18 S. W. Rep. 54; Brown v. State, 35 Tex. 691; Radford v. State, Id. 15; People v. Frank, 1 Ida. 200; Hannahan v. State, 7 Tex. App. 664.

The overruling of the motion for new trial was fatal error. In all cases, the "locus delicti" must be proved. People v. Parks, 44 Cal. 105; Burch v. State, 43 Tex. 376; State v. Meyer, 64 Mo. 190; Carter v. State, 48 Ga. 43; Thompson v. State, 51 Miss. 353; McQuistian v. State, 25 Ark. 435; Gastner v. State, 47 Ind. 144; Shadle v. State, 34 Tex. 572; Sattler v. People, 59 Ill. 68; Baker v. State, 34 Ind. 104; Clem v. State, 31 Id. 480; Clard v. State, 46 Ala. 307; Territory v. Freeman, McCohen, 48; Yates v. State, 10 Yerg. 549.

JOHN P. VICTORY, solicitor general, for territory.

The word "knowingly" qualifies not simply the word "purchase," but the whole act described by the words following "purchase." U. S. v. Clark, 37 Fed. Rep. 106; U. S. v. Nathan, 61 Id. 936.

As to the sufficiency of an indictment following the language of the statute, see: State v. Dooley, 26

S. W. Rep. (Mo.) 558; In re McDonald, 33 Pac. Rep. (Wyo.) 18; State v. Taylor, 11 S. Rep. (La.) 576; People v. Marseiler, 11 Pac. Rep. (Cal.) 503; Harding v. People, 15 Pac. Rep. (Colo.) 727; State v. Tisdale, 2 S. Rep. (La.) 406; State v. Eames, 3 Id. (La.) 93.

"Where the evidence does not expressly locate the crime as having been committed in the county charged in the indictment, but there are, in the evidence, references to various localities and landmarks at or near the scene of the crime, known by, or probably familiar to the jury, and from which they may have reasonably concluded that the offense was committed in the county alleged, it is sufficient proof of venue." Duncan v. State, 10 S. Rep. (Fla.) 815. See, also, Warrace v. State, 8 Id. (Fla.) 748; People v. McGregor, 26 Pac. Rep. (Cal.) 97; Sullivan v. People, 28 N. E. Rep. (Ill.) 381; Lewis v. State, 24 S. W. Rep. (Tex.) 903; People v. Curley, 58 N. W. Rep. (Mich.) 68; People v. Wood, 30 N. E. Rep. (N. Y.) 243, and 131 N. Y. 617; People v. Etting, 34 Pac. Rep. (Cal.) 237; Sullivan v. People, 13 N. E. Rep. (Ill.) 248; State v. Farley, 53 N. W. Rep. (Iowa) 1089; Adams v. Harrington, 14 N. E. Rep. (Ind.) 603; R. R. & Bkg. Co. v. Gamble, 3 S. E. Rep. (Ga.) 287; Kansas City, etc., v. Burge, 21 Pac. Rep. (Kan.) 589; Marx v. Croisan, 21 Pac. Rep. (Ore.) 310.

Venue need not be proved by direct testimony, and the doctrine of reasonable doubt does not apply. State v. Sanders, 17 S. W. Rep. (Mo.) 223; Hicks v. Territory, 6 N. M. 596; Weinecke v. State, 51 N. W. Rep. (Neb.) 307; State v. Vari, 14 S. E. Rep. (S. C.) 392; Abrigo v. State, 15 S. W. Rep. (Tex.) 408; Cox v. State, 12 Id. (Tex.) 493; Smith v. State, 10 S. Rep. (Fla.) 894.

Evidence that crime was committed "in Hendron district, sixteen miles from Springfield," sufficient to establish venue. Hays v. Com., 14 S. W. Rep. (Ky.)

832; State v. Hill, 10 Id. (Mo.) 28; State v. Dougherty, 17 Id. (Mo.) 303; Forehand v. State, 13 Id. (Ark.) 728.

BANTZ, J.—The defendant was indicted, tried, and convicted of knowingly purchasing certain sheep of one who was not the owner, and who had no right to sell them. The indictment alleged that the sheep were the property of Andres C. De Baca and Apolonio Rael. The proof showed that the sheep were owned by the wife and children of Andres C. De Baca, but that he had the care, custody, and actual possession of them; that Apolonio Rael also had sheep in the same band from which these were taken, but he employed a separate herder, and his sheep were differently earmarked. The proof was sufficient to sustain the averment of property as to Baca, but there was no evidence of title, possessory or otherwise, in Rael of the sheep stolen; and the question is as to whether, under an allegation of ownership by two persons, proof of ownership in only one will be sufficient. Starkie and Bishop cite with approval the rule laid down by Lord Hale, that "there must be certainty in every indictment touching the thing wherein or of which the offense was committed." 1 Starkie, Cr. Pl. [2 Ed.] 182. The defendant is entitled to be apprised of the charge which he is to meet, and it must be so specific as to inure to his defense upon a subsequent indictment founded upon the same circumstances. Any repugnancy or inconsistency in the name of the person injured will vitiate the indictment. 1 Starkie, Cr. Pl. 185. The name of the owner of the property can not be dispensed with except in particular instances, which are exceptions from the necessity of the case. The indictment must either state the name of the owner or account for the omission by averring that the owner is unknown; and, in general, an inaccuracy or repugnancy in the allegation, or

INDICTMENT: proof: variance.

variance in the proof of ownership, will be fatal to the indictment. 1 Bish. Cr. Proc., sec. 582; 1 Bish. New Cr. Proc., secs. 581, 582. This rule, it is said, applies to larceny, burglary, arson, embezzlement, extortion, malicious mischief, receiving stolen goods, robbery, false pretense, and, in general, "to all offenses which consist wholly or in part of a wrong done to real or personal property, or the possession of one who is injured thereby." 1 Bish. New Cr. Proc., sec. 583. It applies to statutory as well as common-law offenses. 2 Bish. Cr. Proc., secs. 843, 850; Bish. St. Crimes, secs. 428, 443, 453, 457. The reason ownership must be proved as alleged is that it identifies the offense, distinguishing it from other instances. Hence, even when needlessly alleged, proof appears necessary. 1 Bish. Cr. Proc., sec. 488b. Thus, an indictment for receiving stolen goods need not allege the name of the thief, but, if it is alleged, the evidence must correspond to the allegation. The allegation being regarded as descriptive of the identity of the offense, if the pleader sees fit to employ greater particularity in that description than really necessary, he must nevertheless prove it as alleged. 1 Bish. New Cr. Proc., secs. 483, 488. The allegation of ownership by two persons is not satisfied by proof of ownership by only one of them, and the instruction given to the jury by the court was erroneous in that particular. The cause is therefore reversed and remanded.

COLLIER and HAMILTON, JJ., concur.

[No. 645. December 20, 1895.]

IN THE MATTER OF CONTEMPT v. THOMAS HUGHES AND W. T. McCREIGHT, RESPONDENTS.

CONTEMPT OF COURT—NEWSPAPER PUBLICATION—PUNISHMENT.—In a proceeding for contempt against the publishers of a newspaper for the publication therein of an article attributing improper motives to the members of the supreme court in the institution of a disbarment proceeding then pending, the publisher and editor of such paper may be summarily punished by the court for contempt, by imprisonment, for such publication, made with his knowledge, although he may disclaim any intention of reflecting upon the court, or any of its members.

PROCEEDING for contempt. Respondent, Thomas Hughes, found guilty, and sentenced to imprisonment in the Bernalillo county jail for sixty days; COLLIER, J., concurring; SMITH, C. J., in the result; and BANTZ and HAMILTON, JJ., dissenting from punishment inflicted, in separate opinions filed.

The facts are stated in the opinion of the court.

W. B. CHILDERS, A. A. JONES, and JOHN P. VICTORY for the territory.

EDWARD L. BARTLETT for respondents.

LAUGHLIN, J.—The respondent was attached upon an affidavit and information made by W. B. Childers, a member of a committee appointed by this court, to prepare and prosecute charges against Thomas B. Catron and Charles A. Spiess for alleged unprofessional conduct in the trial of the case of the territory of New Mexico against Francisco Gonzales y Borrego et al., for the murder of Francisco Chavez, which was tried in the district court for the county of Santa Fe, in the month of May, 1895. Jacob H. Crist, the district

attorney, represented the territory in the trial of that case. At the July, 1895, term of this court, the said Crist, as district attorney, filed his own affidavit and copies of portions of the testimony taken upon the trial of said cause, and also the affidavit of several other persons, in which it was alleged that the said Thomas B. Catron and Charles A. Spiess had been guilty of efforts to procure false affidavits from the witnesses and otherwise improperly affect the testimony of the witnesses in that case. Upon the filing of said affidavits by the said district attorney, this court appointed John P. Victory, A. A. Jones, W. B. Childers, S. B. Newcomb, and B. S. Rodey, all prominent members of the bar of this territory, to inquire into the alleged offenses, and to prepare and file proper charges against the said Catron and Spiess, if, in their judgment, it should be deemed necessary, and present them to this court, and to procure such evidence as they thought proper, and submit the same to the court, in order that there might be a full investigation of the charges so made against the said respondents, Catron and Spiess.

After the committee had filed such charges, and the hearing upon same had been fixed by the court, while they were pending and undisposed of in this court, there was a publication in the Daily Citizen, a newspaper published at Albuquerque, in the county of Bernalillo, of an article nearly three columns in length, entitled "Is it Honesty or Partisanship?" The following are extracts from said article: "Last Sunday evening, Chief Justice Smith, of the supreme court of this territory, wired W. B. Childers that he intended to spend the night with him in this city. It has been reliably ascertained that the object of his visit to Albuquerque, outside of his own district and away from Santa Fe, the seat of the supreme court, was to consult with Childers, one of the attorneys designated to 'formulate' charges against T. B. Catron, based on infor-

mation in the nature of affidavits and copies of a part of the evidence in the First judicial district court, in the case for the murder of Chavez, presented by J. H. Crist. Judge Smith, notwithstanding the fact that he is a member of the supreme court, and as such one of the judges to hear and try such charges, has, contrary to all precedent, delicacy, and the ethics pertaining to the judicial action, descended from the high position which he should have commanded, so as to appear in the partisan effort to ruin the character of an attorney whose only crime is that he was, at the last election, selected by a majority of about three thousand votes to represent New Mexico in congress. In his zeal to cripple the influence of Catron to aid New Mexico and her people, Judge Smith has made this visit to Albuquerque, and at the residence of Childers took up nearly the whole night in discussing the case and its merits. It is well understood that, prior to any action taken in the supreme court in this matter, Judge Smith also met and had a full consultation with Childers, Crist, and other attorneys, who were at enmity with Catron, in regard to the propriety and feasibility of pushing the cause against Catron; that it was there determined that it was necessary to push them for political and personal reasons; that Judge Smith would see that they were referred to a special committee of the bar, composed of a majority who would be hostile to Catron, either politically or personally, or both, but that it should be so done that it should be made to appear to the other members of the supreme court that it was intended to be nonpartisan. * * * We do not desire or intend to reflect on the supreme court or any member of it, only to state the facts as we have heard them, for the information of the public. We do think, however, the action of Judge Smith was very reprehensible. He had no more occasion to consult with a member of that committee in advance than he had to become the prose-

cutor in that or any other cause which might come before him in the supreme court or the district court. He sits as a juror. Having taken an active part in advising in regard to the cause,—having manifested his prejudice, if we are correctly informed,—he is no longer qualified in that case. Yet, if appearances and reports are true, he has not demeaned himself as a fair, upright, and manly judge should have done. No judge having any regard for his office or for the esteem for his fellows, since the time of Bacon and Jeffreys, has ever allowed himself to be consulted or to take part in advising the course to be pursued in a given case. The management of causes, and the propriety of the course to be pursued, and the accusation to be presented in any case, should be left to the legal profession, and, in a case like this, to the Bar Association of New Mexico, of which Catron and Spiess are both members, and where such matters properly belong. It can scarcely be considered that Judge Smith has acted fairly and impartially in this cause if the facts as we learn them be true. The other members of that court should see that the judicial ermine is not dragged in the mud of politics and of personal enmity, and should promptly check any partisan zeal or political hostility which may be manifested in that cause if there be any display thereof. * * * Why does the supreme court assume to take control and ignore the bar association, of which each member of the court is a member? Why is the grievance committee of that association composed of such men as N. B. Field, George W. Knaebel, S. B. Newcomb, Frank Springer, and A. A. Jones, ignored? Are not these men capable of looking into the truth and reasonableness of the charges? These are men whose integrity, ability, and fairness can not be questioned, unless it be by those who seek to perpetrate a wrong. It is no partisan committee. Three of its members are democrats, and two

republicans. Two of them, Newcomb and Jones, have been placed on the committee to formulate these charges. But Field, Knaebel, and Springer have been shoved aside, Field being chairman. Instead of three such men as Field, Knaebel, and Springer, Victory, Childers, and Fiske, persons either politically or personally hostile to T. B. Catron, were placed on the committee. Why was this? Was it fair, or was it that they did not believe in the honesty, integrity, and fairness of Springer, Knaebel, and Field? Or was it, possibly, in order that the advocates of certain peculiar ideas should go upon the committee to besmirch the character of other members of the bar? We hope the latter is not the case. We believe it is not; but, if it be such, then to what low, contemptible, degraded, and insignificant place can the judiciary descend. * * * The individual who penned or inspired that article, or both, and every one else who knows anything, knows the members of the supreme court individually never read over the alleged charges and annexed papers presented by Crist, nor have they heard them read over, but, without reading or hearing them read, referred them to the representation of some one of the committee, with instructions simply to formulate charges based thereon, but not to examine into the truth of the facts or the probability of their correctness. It is further well known that Catron's attorneys applied to the court on motion, and asked to have the charges investigated by the committee, and their powers enlarged for that purpose, so that they might determine whether there was any reasonable foundation for preferring charges. The supreme court refused to accede to this motion. That thereafter the committee itself applied to the court, and requested to be informed as to their duties, and most, if not all, of the committee stated that if they were required to examine into the facts of the charges, or do anything except to act ministerially

in formulating charges upon the supposed facts before them, that they declined to act upon the committee. They were therefore informed by the court that they were to formulate charges upon the matters presented to them, and stand between the court and wrong. What that meant does not seem to be very clear. These facts, although done in private, with closed doors, none present but four members of the court and the committee, have reached the light of day. How can it be said that the court or any committee has in any manner passed upon the correctness of the charges or the possibility of sustaining them. No investigation has been made by either. Why were not these charges preferred in the district court, where the facts complained of are said to have happened, if at all, and that also before Judge Hamilton? * * * We do not write these facts to influence the supreme court. We expect to be governed solely and entirely by the merits of the case. We do demand, however, that the case shall be tried according to law; that a proper weight should be given, in view of all the facts and surroundings, to the testimony of each witness. We do demand that politics shall be eliminated; that personal hostility and enmity shall be set aside, and nothing but the strictest kind of justice and honesty shall prevail."

The information against said Hughes states that he and one W. T. McCreight are partners, under the name of Hughes & McCreight, and the proprietors of said paper, and has attached to it a copy of said article, alleging that the same was published by the said Hughes & McCreight in said newspaper, which had a general circulation in the territory of New Mexico and in Santa Fe, the capital of said territory, where this court was then in session, and about to proceed to the investigation of the said charges against the said Catron and Spiess. Upon the filing of said information, a writ of attachment was issued for the appre-

hension of the said Hughes & McCreight. Said McCreight was attached and brought before the court, and to him certain interrogatories were submitted, to which he filed answers; and thereupon the court fined the said McCreight in the sum of $25 and costs of the proceeding. It appeared from the answers of said McCreight that he had no personal knowledge of the publication of the said article, or that it was to be published until it appeared in said newspaper, and that he was more immediately connected with the local work on said paper than the editorial department.

It appears from the marshal's return and otherwise that, upon issuance of said attachment, the said respondent Hughes fled from the territory of New Mexico, and was apprehended by the United States marshal at the town of Winslow, in the territory of Arizona, and brought back, and presented before the court in the custody of the marshal. Certain interrogatories were submitted to said Hughes, and answered by him, some of which, together with his answers, are as follows: "Ans. 12. The article was found, as I have stated, upon my office desk. It was typewritten and unsigned. I read it very hurriedly; hung it on the copy hook; and, as I was extremely busy on that day, I sent the article in 'takes' to the printers, and did not read the article until the proof sheets came down; and then, in the hurry of the day, it was placed on the editorial page in making up the forms. I did not read all the proof. W. S. Burke read a portion, and I read a portion; and I never read the entire article until after it was printed in the paper. I had no knowledge or information at that time or since of the authorship of the article. Int. 13. Did not W. S. Burke, who is employed as a writer on said newspaper, when reading a part of the proof of said article above referred to, state to you, in substance or effect, that said article was 'loaded,' meaning that it was libelous, and that it

was calculated to get you or the paper in trouble? Ans. 13. He did, in substance, and he changed one sentence in the article at his suggestion."

Respondent further states on his oath that at the time the United States deputy marshal came to where he was stopping at the hotel in Winslow, Arizona, respondent did not ask for his authority nor demand to see any warrant, but voluntarily went with said marshal to the train, and returned to New Mexico; and that, after arriving within the limits of said territory, said deputy marshal read to respondent the warrant which has been returned into this court. And respondent further states, upon oath, that, in the publication of the article referred to, he had no intention or desire to reflect upon the supreme court of the territory of New Mexico, its chief justice, or any member of said court, nor any intention or desire to impede or obstruct the course of justice in any cause or matter pending before it; and that if respondent had read the article in question with care before it was published, or had been aware of the character of its contents, the same would not have been published in said newspaper, and respondent deeply regrets that, by reason of his haste, such a publication should have appeared in his paper, on October 17, 1895.

After the answer had been filed, and the case heard, and the judgment rendered, but before the sentence of the court had been pronounced, the respondent published in his paper a retraction, which is as follows, to wit:

"An article appeared in the Daily Citizen on the ninth day of this month reflecting on Chief Justice Smith, of the territorial supreme court. Investigation shows that the article was false in many particulars. The article appeared as an editorial, though it was not written by the editor of this paper. We are now convinced that the objectionable language referred to in

the article was fairly and reasonably open to the construction put upon it by the supreme court, though no such construction was intended or thought of by the editor of this paper when the same was published. We fully realize the importance of having the courts of justice unimpeded by newspaper articles or criticism reflecting upon the character of the court or any member thereof. We wish to reiterate our regret that said publication should have appeared, and we desire to give this public assurance that hereafter no such article shall appear in these columns. It appeared and was published through gross carelessness, and without any malicious intent on the part of the editor of this paper; and we desire in this public manner to make apology to Chief Justice Smith and the members of the territorial supreme court of New Mexico.

"THOS. HUGHES,
"Editor Daily Citizen."

The question was argued before the supreme court as to whether the said Hughes should be punished for the publication of said article upon the answers filed by him. A majority of the court held that the answers could not be contradicted, and excluded all testimony offered for the purpose of contradicting the same, partly upon the ground that the practice did not permit the answers of the respondent in such cases to be contradicted, and partly upon the ground that the answers of said Hughes themselves showed guilty knowledge of the contents of said editorial, and that the publication thereof was admitted by him. It will be seen from an examination of said answers that the said Hughes claims that he was entirely ignorant of the authorship of the said article; that he found the same upon his table or desk in his office, and was wholly ignorant of how it came to be there; that he caused same to be set up and published in his paper without making any inquiry what-

CONTEMPT of court—newspaper publication—punishment.

ever into the authorship of the article, or as to the truth of the charges therein made against the chief justice and the other members of this court.

An examination of the extracts quoted above from said article, will show that it was not only a most flagrant attack upon the chief justice, but also other members of the court, and the court as a whole, charging them with dishonest and partisan purposes in the entertainment of the charges against the said Catron and Spiess, and the appointment of a committee to prosecute the same. It would be difficult to find in the proceedings of courts for contempt, or in the history of newspaper publications, a more flagrant and outrageous abuse of the liberty of the press. A more flagrant contempt of court probably never was perpetrated by the publication of a newspaper article than in this instance, and the answer of the defendant that he was ignorant of the purpose or effect of the article, and of the authorship of it, instead of mitigating his offense, aggravates it; and it is impossible to escape the conclusion that his flight from New Mexico was in consequence of the issuance of this writ of attachment for his apprehension. No other satisfactory reason has been suggested to the court for such flight.

The judgment of this court in finding the said Thomas Hughes guilty of contempt, and sentencing him to imprisonment in the jail of the county of Bernalillo for sixty days, and one dollar fine and costs, was rendered during the progress of the investigation of the charges against the said Catron and Spiess. But, deeming the questions herein involved of such importance to the public that they should be thoroughly understood, we have concluded to state what we believe to be the law concerning contempt of court committed by the publication of articles in newspapers reflecting upon judicial tribunals.

Mr. COOLEY, one of the most eminent American

jurists and writers on constitutional law, states the law as follows: "It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made."

In the case of People v. Wilson, 64 Ill. 221, the supreme court of the state of Illinois, the opinion being rendered by its chief justice, says: "I merely quote the rules as laid down by Bishop, an American writer, in his work on Criminal Law (page 216). He uses the following language: 'According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.' Whether tested by this common law definition or by the rule laid down by this court in the case of Stuart, already cited, there is no room for doubt that the article in question must be held a contempt of flagrant character. It related to a case in court involving in its final issues a human life.. The answers of the respondents state that, at the time of the publication, 'there was intense excitement in the community, and particularly in the city of Chicago, on account of frequent murders, and the escape of the perpetrators thereof.' This is no doubt true, and this article seems to have been studiously written with a view to direct popular clamor against this court, and compel it either to affirm the judgment sending Rafferty to execution, or incur the imputation of bribery, and the clamor of

an angry city to be echoed throughout the state by a portion of the Chicago press. The demand was not that we should calmly examine the record of Rafferty's trial to see whether his conviction had been legal, but that we should give him over to execution, because there was such impunity for crime in the city of Chicago that it was necessary some men should be immediately hung. We have since examined the record of this man's conviction, and reversed the judgment; all the members of the court holding that a plain provision of the statute had been violated on his trial. Let us say here, and so plainly that our position can not be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions, or official conduct in regard to cases that have passed from our jurisdiction so long as our action is correctly stated, and our official integrity is not impeached. The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government. Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither of these respondents, nor any intelligent person connected with the press, and having a just idea of its responsibilities, as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending cases. A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration; but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on the one side or the

other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude. It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence. So far as we are personally concerned, we should have preferred to do so. We desire no controversy with the press. But a majority of the court were of the opinion that this publication could not be disregarded without infidelity to our duty. By our relation to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account."

In a note of the learned editor of the American Decisions to the case entitled In Sturoc (97 Am. Dec. 630), the following will be found: "Publications in Newspapers as Contempts. It has long been settled, and is now generally acknowledged, that certain publications in newspapers may amount to contempts of court, and may be summarily punished as such. Publications pending a suit, reflecting on the court, the jury, the parties, the officers of the court, or attorneys with reference to the suit, and having a tendency to influence the action of the tribunal before which the case is pending, are a contempt of that court, which may be summarily punished by attachment if the publication has a tendency to prejudice the public, a part of whom may thereafter be summoned as jurors, with respect to the merits of a case pending in the courts, and to corrupt the administration of justice. Publications scandalizing the court, and intended to unduly influence and overawe its deliberations in causes pend-

ing, are contempts, which this court is authorized to punish by attachment; and it is essential to the dignity of character, the utility, and independence of the court, that it should possess and exercise such authority." People v. Wilson, 64 Ill. 221. To the same effect: Hollingsworth v. Duane, Wall. Sr. 77 Fed. Cas. No. 6616; Bronson's Case, 12 Johns. 460; State v. Morrill, 16 Ark. 384; Respublica v. Passmore, 3 Yeates, 441, 2 Am. Dec. 388, and note; Respublica v. Oswald, 1 Dall. 319; Stuart v. People, 3 Scam. 405.

In treating of this subject, Mr. Bishop says: "Again, according to the general doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt." 2 Bish. Cr. Law, sec. 259; In re Cheltenham, etc., Ry. Carriage & Wagon Co., L. R. 8 Eq. 580; Daw v. Eley, L. R. 7 Eq. 49; Littler v. Thomson, 2 Beav. 129; In re Crawford, 13 Jur. 955; Reg. v. Onslow, L. R. 9 Q. B. 219, 12 Cox, Cr. Cas. 358, 5 Eng. Rep. 443; Reg. v. Skipworth, L. R. 9 Q. B. 219, 5 Eng. Rep. 456; Reg. v. O'Dogherty, 5 Cox, Cr. Cas. 348; Anon., 2 Atk. 469.

In State v. Morrill, 16 Ark. 399, the court goes further, and says: "The cases above cited (and many more might be cited if deemed at all necessary) abundantly show that, by the common law, courts possessed the power to punish, as for contempt, libelous publications of the character of the one under consideration, upon their proceedings pending or past, upon the ground that they tended to degrade the tribunals, destroy the public confidence, and respect for their judgments and decrees, so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice." Applying these

principles, the supreme court of appeals of West Virginia, in a late case, held that a publication in a newspaper where the court was sitting, with reference to a case then pending and undetermined, charging three of the four judges of the court with having attended a political caucus more than a year before, and in the caucus advising the action out of which the case arose, and promising the caucus to hold its action legal and proper, and charging the court with having agreed to decide the case before an approaching political convention for political purposes, was a contempt of that court which they should summarily punish. State v. Frew, 24 W. Va. 416. So, where a number of the members of the bar unite in a publication falsely charging the judge of the supreme court with having improperly participated in politics, and insinuating that they would favor their fellow partisans in their judicial deliberations, they are guilty of such contempt as justifies their suspension from practice, until they purge themselves of it. Ex parte Moore, 63 N. C. 397. Tenney's Case, 23 N. H. 162, affords another illustration of this rule.

Among the more recent cases where the publication of such articles in newspapers has been punished as contempt of court is Burks v. Territory (decided by the supreme court of Oklahoma, on September 7, 1894), 37 Pac. Rep. 829. In that case it was decided that the power to punish for contempt is inherent in courts of record; that the legislature has no power, in the absence of constitution provisions, to limit or regulate the inherent powers of the courts to punish for contempt; and that the party accused has no right of trial by jury in a contempt proceeding. The court has also decided that the United States statute of March 2, 1831, which is embodied in section 725 of the Revised Statutes of the United States, limiting the power of the courts of the United States to inflict summary punishment for

contempt of court, is not applicable to the courts of the territory, these courts not being courts of the United States to which these provisions of the acts of congress are applicable. The court decided in that case that publications made in a daily newspaper, while a matter is pending in the court, as to whether or not a certain report presented by the grand jury shall be received by the court, or returned to the grand jury for further proper action and corrections, to the effect that the action of the judge seemed to indicate that he intended to withhold the report, and that, if the judge persisted in carrying out such intention by suppressing the report of the grand jury, the act might be characterized as a flagrant violation of the people's rights, and charging by direct implication that the action of the court is "an effort to browbeat the grand jury, and an effort to bend the grand jury to the will of the judge," and "a serious matter," constituted a contempt of court. In the opinion it is said: "Such conduct is often overlooked by the courts, when the acts are serious injury to the public. The diffidence of courts to take up for investigation and punishment matters which are aimed, not only at the court in its public capacity, but also in its individuality, often permits such transgressions as contempts of court to be overlooked and allowed to go unnoticed by the judges of the courts; and the public welfare, the morals, the good behavior, and the proper consideration of a community for governmental functions are thereby greatly injured." The defendant insisted that the statute of Oklahoma provided for the punishment of criminal contempt upon indictment by the grand jury. It says: "The legislature intended that the public itself might also have a right to prosecute these offenses,—not to take away the power which the court already had to punish the offender, but prescribe a means in addition to that already possessed for such punishment." It

then proceeds: "The power to punish for contempt of court is inherent in all courts of record." Ex parte Robinson, 19 Wall. 505; In re Millington, 24 Kan. 214; People v. Stapleton (Colo. Sup.), 33 Pac. Rep. 167; Middlebrook v. State, 43 Conn. 257; Holman v. State, 105 Ind. 513, 5 N. E. Rep. 556. The court also very well says in its opinion: "We decline in this case to give character to a manufactured sentiment by joining in the too often repeated discussion of a perverted application of our beneficent heritage of freedom of speech and liberty of the press. During these occasions, when crime stalks abroad cloaked in the garb of liberty, and when the assassin of our highest and noblest institutions of civil government would audaciously bid the hand of justice bestow reward for punishment too long deserved, we are reminded of the historic words of Madam Roland: 'Oh Liberty! How many crimes are committed in thy name!' and resolve that the shield of the innocent shall not be the weapon of the guilty."

In the case of the Territory v. Murray, decided by the supreme court of Montana, and reported in 15 Pac. Rep. 145, it was decided that the sending and publication of a telegram in a newspaper of general circulation of a dispatch that two persons (real estate agents), on the day of the sending of the telegram, made a wager of $500 that, owing to the influence of some persons interested in a cause pending before the supreme court of Montana, the court would reverse their former decision, was a flagrant contempt of court; and this court also held that the acts of congress had no application to the courts of a territory, and that the disclaimer of the defendant in his affidavit of any intention to treat the court with the slightest contempt in publishing the telegram was not binding upon the court, but that it might inquire into the truth of the matter. "The meaning and intent of the defendant in publishing the

dispatch must be determined by a fair interpretation of the language used. The construction and tendency of the publication as bearing upon its character as a contempt are matters of law for the court." Henry v. Ellis, 49 Iowa, 205; People v. Wilson, 64 Ill. 195; and numerous other authorities.

In the case of Cooper v. People (decided by the supreme court of Colorado), 22 Pac. Rep. 790, the court quotes from the case of Watson v. Williams, 36 Miss. 331, as follows: "The right to punish contempts by summary convictions is a necessary attribute of judicial power, inherent in all courts of justice from the nature of their organization, and essential to their existence and protection and to the due administration of justice. It is a trust given to the courts not for themselves, but for the people whose laws they enforce and whose authority they exercise; and each court has the power for itself finally to adjudicate and punish contempts without interference from any other. The right to punish for contempts extends not only to acts which directly and openly insult or resist the powers of the court or the persons of the judges, but to indirect and constructive attempts which obstruct the progress and degrade the authority of the courts." In this case, the supreme court of Colorado, speaking of the pretended right of trial by jury in contempt proceedings says: "Prior to, and at the time of the adoption of these constitutional provisions, courts had at common law the undoubted authority to punish summarily, without a trial by jury, both constructive and direct contempt. And it is difficult to see how the provisions in reference to jury trials in suits and prosecutions for libel can be so construed as to either extend this right to contempt proceedings, or to support the argument that, as jury trials are not allowed in matters of contempt, therefore the constitution takes away the power to punish as for a contempt for matters spoken, written, or pub-

lished beyond the immediate view or presence of the court, although presenting no barrier to summary punishment for direct contempts. No court has ever yet held that the right of trial by jury extends to contempt proceedings, and to so decide would defeat the very object of the power. So to hold would place it in the power of a vicious person so to conduct himself as to prevent any kind of a trial. As we have seen, the power to punish summarily for contempt is essential to the very existence of the court. Cooley, Const. Lim., p. 390, note 3." The authority of the courts to punish summarily, as for contempt, parties publishing articles in reference to causes pending, when such publications tend to corrupt or embarrass the administration of justice, has been expressly upheld, notwithstanding the existence of such constitutional provisions. State v. Morrill, supra; Myers v. State, 22 N. E. Rep. (Ohio Sup.) 43; State v. Frew, supra; Sturoc's Case, 48 N. H. 428; 2 Bish. Cr. Law, 259. In State v. Morrill, supra, the court said: "The counsel for the defense suppose that the power of the courts to punish, as for contempt, the publication of libels upon their proceedings, was cut off by the seventh section of the bill of rights, which is in these words: 'The printing presses shall be free to every person, and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and think on any subject, being responsible for the abuse of that liberty,' is an answer to the argument of the learned counsel. It is a well known fact that the bench and bar have been in this and all other countries, where the law has existed as a distinct profession, the ablest and most zealous advocates of liberal institutions, the freedom of conscience, and the liberty of the press; and none have guarded more watchfully the encroachments of power, on one hand, or deprecated more

earnestly tendencies to lawless anarchy and licentiousness, on the other. The freedom of the press, therefore, has nothing to fear from the bench in this state. No attempt has ever been made, and we may venture to say never will be made, to interfere with its legitimate province on the part of the judiciary by the exercise of the power to punish contempt."

In the case of State v. Faulds, 42 Pac. Rep. 285, the supreme court of Montana, in an opinion rendered November 11, 1895, quotes with approval the following from the case of State v. Morrill, 16 Ark. 384. The court says: "If an ignorant or impolite man stalks into a courthouse with his hat on, or makes a noise about the door, or disobeys process, all agree that he may be punished for contempt; but if a man has an important case pending in court, and, willing to resort to desperate measures to succeed, publishes, on the eve of the trial, a libel, alleging that the judge has been bribed to charge the jury against him, and that all the witnesses who are to appear on behalf of the opposing party have been corrupted and are unworthy of credit,it is no contempt, and the judge must labor under the embarrassment of sitting in the case, under such circumstances, with his mouth closed. Or if a judgment is rendered against a man, as soon as the judge leaves the bench, he is met at the door, insulted, and assaulted by the party, in consequence of his decision, and then a publication is made in a newspaper charging him with corruption in rendering the judgment, and calling upon the community to disregard and resist its execution, and yet this is no contempt!" The supreme court of Montana also says: "Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well-being in society, by obstructing the course of justice. If a judge is really corrupt and unworthy the station which he holds, the constitution has provided an

ample remedy by impeachment or address, where he can meet his accuser face to face, and his conduct may undergo a full investigation. The liberty of the press is one thing, and licentious scandal is another. The constitution guarantees to every man the right to acquire and hold property by all lawful means, but this furnishes no justification to a man to rob his neighbor of his lands or goods." This court, in reference to the facts stated that the constitution of Montana limits the power of the two houses of the legislature to punish for contempt, but does not restrict the common-law power of the court, says: "There is a good reason why the framers of the constitution might well have made this distinction. The legislature is a political body. If its proceedings and the conduct and motives of its members are unjustly assailed by libelous publications, they may defend their official conduct, and repel attacks through the press and upon the 'stump;' but it is not the usage of the country, nor would it comport with the dignity of judicial stations, for judges to resort to newspapers or the public forum in defense of the integrity of their decisions, etc., and it should be an unwise policy that would drive them to such a course." State v. Faulds, 42 Pac. Rep. (Mont.) 285.

Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence or control judicial action? Days and sometimes weeks are spent in the endeavor to secure an impartial jury for the trial of a case; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the mind of the juror may not perchance be unduly biased or prejudiced in reference either to the litigants or to the mat-

ters upon trial. But if an editor, a litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective sarcasm, or denunciation, to influence the result of the trial, all the care taken in the selection of the jury, as well as the precaution used to confine their attention at the trial solely to the issues involved, will have been expended in vain.

In the case of Myers v. State, it is decided by the supreme court of Ohio (1889): "The furnishing by a correspondent for publication, and procuring to be published, in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case on trial, which, if true, would render him an unfit person to preside at a trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable grounds to believe that the same will, when published, be circulated in the court room and about the courthouse during said trial, and there read, and which was afterward, during the trial, circulated and read therein, is a contempt of court." 22 N. E. Rep. 43. It is also decided in this case that, though the libel was in a large part against the presiding judge, that fact did not disqualify him from trying the proceedings for contempt. It was not the libel against the judge which constituted the offense for which the respondent was liable as for contempt of court. The offense consisted in the tendency of his acts to prevent a fair trial of the cause then pending in the court. It is this offense which constitutes the offense, and for which he could be punished summarily; and the fact that, in committing this offense, he also libeled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the ad-

ministration of justice. This is also decided in the case of the People v. Stapleton, 33 Pac. Rep. 167, by the supreme court of Colorado.

In the case of Ex parte Barry, 25 Pac. Rep. 62, it is decided by the supreme court of California that a publication made by a newspaper after the judge of the superior court has sustained a demurrer to a petition, with leave to amend, denouncing the judge for his action, is a flagrant abuse of the liberty of the press, and an unlawful interference with the proceedings of the court, punishable by fine and imprisonment as for contempt.

In the case of State v. Frew (decided by the supreme court of West Virginia), 24 W. Va. 416, the authorities are also reviewed at great length from nearly every state in the Union, and all to the same effect.

In Spalding v. People, 7 Hill, 301, it was said by NELSON, C. J. (afterward an associate justice of the supreme court of the United States): "The remedy by indictment is ofttimes found too tardy for the exigency of the case; hence the law has always authorized the more summary proceeding by attachment as for a criminal contempt, whereby the offender is arraigned at once upon the charges, and the courts of justice more promptly vindicated and sustained."

But, in our opinion, the judges of this court would have been guilty of a most flagrant failure to appreciate the dignity of the position which they hold, and their duty to the proper administration of justice, had they shrunk, however unpleasant it might have been to themselves, from meting out to the offender in this case adequate punishment. It may be properly said in this connection that the court was under no obligations to credit the statement of the respondent Hughes that he was ignorant, and could form no opinion, as to who was the author of the article in question. The state-

ment bears the stamp of improbability upon its face. The fact that he has vicariously suffered punishment for the author of the article as well as himself should not have commended him to the sympathy of the court, or in any way induced it to mitigate the sentence which was imposed upon him. The court might feel itself called upon to comment upon the conduct of the author of the article in permitting the publisher of the newspaper to stand between the author and the punishment which justice demands. It is difficult to conceive of a man possessed of so contemptible a spirit as, in the guise of secrecy, to write so flagrant a libel upon the character of a court as this newspaper article was, and when the publishers thereof publish to the world under oath that they were ignorant of the author of the article at the time of its publication, and still are so ignorant, not to come forth and avow its authorship. The retraction published by the respondent Hughes should in the minds of all honest and fairminded men, answer at once the proposition that the publication was made by him innocently. How could such a publication be made innocently when he admits that it was false, and that he had no information whatever upon which to base it, and his attention called to its libelous character by his associates before it was printed?

As already stated in this opinion, the answer of the defendant and his subsequent conduct aggravate, instead of mitigate, his offense. It would have been idle, in the opinion of a majority of this court, for the court to have imposed in this instance a mere fine. It might have been possible, and perhaps is probable, that the real author of the article, who escapes punishment, would have come forward and furnished the respondent sufficient money to liquidate the fine had the punishment not been imprisonment.

The court has felt constrained to say this much as the matter was one of duty imposed upon it in the

administration of justice and vindication of the law. It is true that the disbarment proceedings seem to have stirred up a great deal of political feeling and prejudice, due to the prominent standing of one, at least, of the respondents; but that fact neither justified the publication of the libel, nor relieved the court from the necessity of discharging an unpleasant duty. Neither was it in the power of the court, when the charges were preferred against the respondents in the disbarment proceeding, to omit to cause those charges to be investigated. Such an omission would have been a failure to discharge a duty imposed upon the court to the public interest and the proper administration of justice, as well as to the respondents themselves. It is hard to understand how it could be contended for a moment that, in justice to the respondents themselves, there should not have been a full and complete investigation of the charges made against them.

The failure of every well-meaning citizen to dispassionately consider and understand the principles of law that govern the courts in such cases as this, and to sustain the court without regard to the different political complexions of the judges who constituted the court or the citizen himself, is seriously to be deprecated, and argues badly for the prospect of good government in any community or state. Political clamor and prejudice should never be permitted to interfere with the administration of justice and the law, and the judge who yields to it is unfit to fill the position which he holds.

SMITH, C. J., and COLLIER, J., concur.

BANTZ and HAMILTON, JJ. (dissenting).—We have filed a separate opinion, and concur in finding respondents guilty of contempt, but dissent from the punishment inflicted, and some of the views expressed herein by a majority of the court.

This is a proceeding in contempt against the publishers of a newspaper in respect to an article reflecting upon the members of this court, published in relation to a cause then pending. It was conceded at the bar by counsel for Mr. Hughes, one of the publishers, that the article was false, wicked, and harmful; and, although our jurisdiction to punish therefore as a contempt was fully conceded, yet we base our jurisdiction upon the distinct ground that the publication was of a nature calculated and intended to exercise an influence upon the decision of a cause then pending, independently of the law or the evidence produced, and thereby sought unlawfully to interfere with and obstruct the administration of justice. The protection of the citizen against that so-called "liberty of the press," in false, reckless, and malignant assaults, is ordinarily to be found in a civil action or indictment. Even though the publication be in respect to a court of justice, we are not prepared to hold, nor is it necessary in this case to hold, that such publication can be the lawful subject of contempt proceedings, however harsh and unjust the criticism; provided it does not impute impure motives, and is confined to decisions or transactions entirely past, and contains no element affecting some cause pending and undetermined. In People v. Wilson, 64 Ill. 214, after announcing the general proposition that published criticisms of decisions, opinions, or official conduct of the court or its members, in regard to cases that have passed beyond the court's jurisdiction, will not be punishable as a contempt, and that the judicial and all other departments of the government are open to examination and public discussion, yet the court say it is not within the liberty of the press, "to control the administration of justice or influence the decision of pending causes." And LAWRENCE, C. J., pertinently observes: a court will, of course, endeavor to remain wholly uninfluenced by

publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven into the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude." In People v. Stapleton, 33 Pac. Rep. 167, the supreme court of Colorado, in 1893, observed upon this subject: "If the courts of justice may be publicly assaulted by libel and slander, or otherwise threatened or traduced in respect to causes, civil or criminal, pending before them for hearing or trial, then indeed, no one's rights are any longer safe, and life, liberty, and property are held by a feeble tenure in this commonwealth." Imperfect as judicial examinations may be, both sides have a full opportunity to be heard in open court before judgment is rendered; and more danger is to be apprehended from the power of the press over the courts than from the power of the courts over the press. In view of the nature and tendency of the publication set out in this proceeding, and to which we have already called attention, we are entirely satisfied as to our jurisdiction in this case, and of the guilt of the respondent.

The respondent declares under oath that no contempt was, in fact, intended; that, since the publication, he has ascertained the falsity of the charges, and expresses a willingness to publish a full retraction. If, under all the circumstances, the language of the publication, by any fair interpretation, could be harmonized

with good faith on the part of the respondent, we might consider ourselves bound by this answer; but the expressions contained in the publication are too direct and full to be overborne by a disclosure now of what were hitherto secret mental reservations. The respondent, Thomas Hughes, has not therefore purged himself of such contempt; but we do not believe the punishment of imprisonment by the court is warranted.

SMITH, C. J.—I concur in the conclusion that the respondent is guilty of gross licentiousness in the abuse of the liberty of the press, and of willful contempt of this court, but I dissent from the suggestion that a court is subject to imputation of impurity and partisanship after the determination of a cause. It is public policy that judicial tribunals shall be maintained in their dignity, and, until they have so offended that they are liable to impeachment, it is inherent that they shall protect themselves by the exercise of their official power, especially as they are precluded the privilege of otherwise redressing the wrongs done them in their official capacity. The judgment of the court may be condemned and its critic may specify its errors and demonstrate its unwisdom, but its motive can not be assailed. If a high crime or a misdemeanor has been committed, let the offender be arraigned before the bar empowered by the constitution to try such crimes.

[No. 637. December 20, 1895.]

IN RE PETITION FOR DISBARMENT v. THOMAS B. CATRON AND CHARLES A. SPIESS, RESPONDENTS.

ATTORNEYS—UNPROFESSIONAL CONDUCT.—An attorney engaged for the defense in an important criminal trial, has the right to ascertain by proper and legitimate means the nature, strength, and credibility of the testimony to be offered in the case; and his simply visiting a witness to honestly learn what will be his testimony in the case is not unprofessional conduct, so long as he does not, by act or word, or in any manner, attempt to influence the witness to conceal, modify, or falsely change his testimony.

ID.—PROCEEDING FOR DISBARMENT—UNPROFESSIONAL CONDUCT—EVIDENCE—SUFFICIENCY.—The evidence in this cause, under the several specifications set forth in the complaint herein filed, charging the respondents with unprofessional conduct in connection with a certain criminal trial, in visiting and attempting to induce an important and material witness not to testify, or, if he did, to change his testimony, or refuse to testify on the ground that he would criminate himself, and in endeavoring to induce and inducing other important and material witnesses to testify falsely, on such trial,—is considered by the court in respect to each, and held insufficient to sustain any, of the charges and specifications against respondents therein made.

PROCEEDING for disbarment of Thomas B. Catron and Charles A. Spiess. Dismissed; BANTZ, J., concurring, COLLIER, J., in the result, and LAUGHLIN, J., dissenting, in separate opinions filed.

W. B. CHILDERS, A. A. JONES, B. S. RODEY, S. B. NEWCOMB, and JOHN P. VICTORY, solicitor general, for the territory.

NEILL B. FIELD, F. W. CLANCY, FRANK SPRINGER, and A. B. FALL, for respondents.

HAMILTON, J.—This is a proceeding upon charges and specifications for the disbarment of Thomas B.

Catron and Charles A. Spiess, who are members of the bar of this court. The testimony has all been taken on each side, and the matter is now submitted to the court for a determination. The ability and high professional standing of at least one of the respondents, the vast importance of this proceeding in its results, both to them and to the bench and bar of the territory, the great public interest manifested by this investigation, and the anxiety felt in its final determination, have rendered it proper that we should give the reasons which, we think, furnish a sufficient justification for the conclusion at which we have arrived.

The facts and circumstances out of which this investigation arose had their origin in, and are the outgrowth of, a great public criminal trial which occurred in Santa Fe county in the months of April and May, in the year 1895. On the twenty-ninth day of May, 1892, Francisco Chavez, an ex-official and prominent citizen of Santa Fe county, was assassinated. The prominence of the deceased, and the cowardly manner of the murder, aroused that intense public feeling and indignation which usually follow crimes of this character. Investigation led to the detection and arrest of Francisco Gonzales y Borrego and three others, all of whom were charged with the commission of the crime. A preliminary examination of these parties was had before the then district judge of the First judicial district in Santa Fe county, at which a large amount of testimony was taken and a large number of witnesses examined. At the regular term of the district court following, the defendants in that preliminary proceeding were indicted for this crime, and were subsequently, as above stated, tried and convicted, and are now under sentence of death, awaiting the final determination of the case in the supreme court, to which it has been appealed.

The respondents in this proceeding were counsel retained for the defendants in that criminal trial. They

appeared and conducted the case at the preliminary investigation, and also defended them on their final trial in the district court, under the indictment; and it is claimed that, while acting as attorneys for defendants in that case, the respondents were guilty of unprofessional conduct, for which they should be disbarred and removed from practice as attorneys and officers of this court. At the first session of this court in August, 1895, Jacob H. Crist, the district attorney for the First district, who conducted the prosecution in the criminal trial above referred to, appeared in this court, and filed a number of affidavits, charging the defendants with unprofessional conduct, and accompanied them with a petition, calling the attention of the court to the same, and asking the court to take such action in the premises as it should deem best. This court, upon an investigation of the affidavits, deemed the charges of sufficient gravity to call for a full investigation. The court therefore entered an order appointing a committee, consisting of four of the leading members of the bar of the territory, who, in conjunction with the solicitor general, were directed to take charge of the matter, and prepare and file in this court such charges therein as they, in their judgment, might deem proper, and to take charge of such investigation and offer such testimony in support thereof as, in their judgment, the public interests might require. Under this order the committee prepared and filed charges and specifications against each of the said respondents, to which each of them answered, denying all of the charges, and demanding an immediate hearing thereon. The committee to whom had been intrusted the unpleasant duty of filing these charges and conducting this investigation have discharged that duty with zeal and ability which commends itself to the favorable commendation of both the court and the bar.

The charges filed contain five separate and distinct specifications, charging the respondents with five sepa-

rate and distinct unprofessional acts. Testimony has been offered which, if accepted as credible, tends to the establishment of these charges. The respondents have each taken the stand, and have positively, specifically, and in detail denied all of the material allegations set forth in these several charges. The matter is therefore presented to us with a mass of conflicting testimony, upon which we are called upon to sit in judgment, much in the same way as a jury would sit in passing upon the rights of one of its citizens in a different tribunal. It is our duty to try this issue upon the evidence produced and admitted upon this hearing, and to bring to its consideration that calm, deliberate, and unbiased judgment which should ever characterize judicial investigation, and by which a just, correct, and proper conclusion alone can be reached. The respondents have a right to invoke in their behalf, at the hands of the court, that same presumption which should be accorded to the humblest citizen, when placed on trial for the most trivial offense. The prosecution has a right to expect that full, fair, and just credit to all of its testimony which it would demand at the hands of a jury in another and different court. Both parties have a right to demand that, in our consideration and determination, we will be guided by those rules of presumption and the principles of evidence which have become established as a result of the combined wisdom and experience of ages. Guided by these principles, let us come to the consideration of all the testimony offered by either side in this proceeding, and giving to each the full measure of credit to which it is entitled. Let us arrive, if we can, at what is a just and correct conclusion.

The first specification against the respondent Catron charges him with unprofessional conduct, in substance, that he (the said Catron) procured an interview with one Ike Nowell, who was a material witness for the said

ATTORNEYS: unprofessional conduct.

prosecution in said Borrego trial, and who testified on the preliminary examination, and endeavored to get the said Nowell to give entirely different testimony from that which he (the said witness) had given, and tried to get the said witness to avoid testifying in the said cause. The testimony admitted by both sides shows that Nowell was a material witness for the prosecution in that trial, and testified on preliminary examination to material facts, seriously damaging to the defendants; that, after that examination, he was tried and convicted in the district court of Santa Fe county of the crime of adultery, and sent to the penitentiary, and was in the penitentiary at the time of the beginning of the trial of the Borregos for murder; but the prosecution, desiring to use him as a witness in that trial, had secured for him a pardon during the progress of that trial; but the respondent Catron, having been present at the preliminary examination, and having learned that the witness would be pardoned and would again be introduced as a witness on behalf of the prosecution, went out to the penitentiary, and had an interview with the witness Nowell, a few days before he was released and placed on the stand. The testimony of the respondent, uncontradicted, is that the witness Nowell had made two statements, one under oath at the preliminary hearing, and the other and different statement to his partner, Mr. Spiess, the other respondent herein, which statements were entirely opposite to each other, one favorable to his client, and the other favorable to the territory. The respondent, as he says, visited the witness to learn from him which of these statements was true, and which he (the witness) would testify to when again placed on the stand. If the respondent, as he says, honestly believed that the witness had made two statements in relation to the case in which he was a witness, which statements were diametrically opposite to each other, one favorable to his

client and the other unfavorable, then the respondent had a right to use all legitimate and proper means to ascertain which statement was correct, and had a right to talk to the witness himself and learn from him which statement was correct, provided he did not use any improper means, by word or act, to induce the witness to conceal, change, or in any way give improper testimony. Attorneys engaged in the defense of important criminal trials have the right to ascertain by proper and legitimate means the nature, strength and credibility of the testimony to be offered in the case, so long as they do not by word or act attempt in any manner to influence a witness to conceal, modify, or change his testimony from that which is absolutely true. We know of no rule of morals or professional ethics which is opposed to this view. If this is not allowed, then you break down the barrier which the law and the courts have erected as a shield to protect the lives and liberty of the citizens from what might prove an unjust and designing prosecution. We do not wish to be understood as in the slightest degree countenancing any conduct on the part of any attorney in attempting in any manner to influence a witness to conceal, change, or in any manner give improper testimony under any circumstances. Such an act, when established, should meet with condemnation by the bar, and should be visited with disbarment by the court. We discover, however, no unprofessional conduct in the respondent in his simply visiting the witness to honestly ascertain what would be his testimony, so long as he did not in any way attempt to influence him to conceal, falsely change, or modify his testimony.

But it is contended by the prosecution that the respondent Catron visited the witness Nowell for an improper and illegal purpose; that he endeavored to induce the witness not to testify on the trial, or, if he did, to change his testimony, or refuse to testify on the

UNPROFESSIONAL conduct: evidence: sufficiency.

ground that he (the witness) would criminate himself. If we were to credit the whole of the testimony of the witness Nowell, then this part of the charge is established, as Nowell states that the respondent Catron came to the penitentiary, and he had a talk with him, in which the respondent Catron told him (the witness), in substance, that he (Catron) did not want him (the witness) to testify, as he had done before, about seeing the Borregos on the night of the killing of Chavez, and that when the witness asked the respondent how he could "get out of it," and if they would not "get him into trouble for perjury," the respondent told him (the witness) that he could refuse to testify on the ground that the answers "would criminate him" (the witness); that the respondent told him (the witness) that he (the respondent) would be there at the court, and would defend him (the witness) if he got into any trouble. The respondent denies this statement positively and unequivocally. The respondent states that he visited the witness, and had the interview with him, for the purpose solely of learning what his testimony would be upon the trial; that having been advised that the witness had made two statements in relation to the matter, one to Spiess, and one on the preliminary examination, each different from the other, he (the respondent) desired to know which was the truth; that the respondent visited the witness honestly for the purpose of learning from the witness which statement was true. One statement made by the witness was favorable to the clients of the respondents, and one was against them, and favorable to the prosecution; and the respondent, in the interest of his clients, with a desire to learn the true facts, had the interview with the witness. The respondent denies positively that he attempted in any way or manner to influence the witness, or attempted in any way to induce him to change or modify his testimony, save to tell the truth. Re-

spondent testifies that, in his interview, he (the witness) admitted to respondent that the testimony given by him (the witness) on the preliminary examination for the prosecution was false, but the other statement made to Spiess, favorable to the defendants, was true; that he was induced to give his testimony on the preliminary examination because he (the witness) thought it would help him on his trial on the indictment then against him. The testimony of the respondent is a clear and positive denial of the testimony of the witness Nowell that he (the respondent) made any attempt whatever, in any manner, to induce the witness Nowell to swear falsely or change or modify his testimony in any way to conflict with the truth. No one was present when this interview was had, save the witness Nowell and the respondent Catron.

Upon the testimony of these two witnesses, standing in direct opposition upon this part of the charge, neither being supported by corroborating facts, we are asked to reach a conclusion as to whether the first charge is sustained. If this were but a civil suit to recover a debt, instituted by Nowell against the respondent in any of the inferior courts, and the only testimony was the affirmance of one as to the debt, and a positive denial by the other, assuming both to be of the same credibility, could the court pronounce a judgment upon the testimony of Nowell? Under the evidence offered before the court and contained in this record, these two witnesses do not stand before the court possessing equal credibility. The uncontradicted record shows Nowell to have been a penitentiary convict, indicted, tried, and convicted of a felony, and sentenced to imprisonment. He abandoned his home, deserted his family, disavowed his marriage, dishonored his children, and became the companion of disreputable characters, until he is pronounced, by some of his neighbors, at least, as unworthy of credit. Take the

testimony of this witness, weigh it in the scales of impartial justice, as against the testimony of the respondent, test it by those rules which should guide conscientious judicial action, and can we, upon it, pronounce a judgment which will result in the disbarment of the respondent? We do not believe that such a conclusion could be sanctioned or sustained, either by reason or judicial authority. We therefore are irresistibly led to the conclusion that this charge is not sustained by the evidence.

The ground of the second charge of unprofessional conduct against the respondent Catron is, in substance, that one Porfilia Martinez de Strong was a witness who testified for and on behalf of the defendants in the trial of the Borregos, both at the preliminary hearing and at the final trial, and that such testimony was material, and that it was false, and that she was induced to give such false testimony by the improper conduct of the respondent. Her testimony shows that parties came to her house at Lamy at night and brought her under what she supposed was a warrant, to Santa Fe; that she was taken to the house of Charles Conklin, and he told her what she was brought for, and what she must testify to; that she went upon the stand at the preliminary hearing, and gave this testimony; that, upon the final trial, she was again brought to Santa Fe, and taken to a room in the office of the respondent Catron, and slept there; her meals were brought to her; that she was brought to the courthouse, and testified, and was then taken back to this room, and remained there until the train went out, and then returned home. She was brought back a few days after, was placed again on the stand by the district attorney, and was cross-examined. In this latter examination she testified that all her former testimony given for the defendants, both in court and on the preliminary hearing, was false and untrue; that she was induced to give this false testimony because

she was afraid to tell the truth. Her testimony in this regard is clearly contradicted by other witnesses in the case. The testimony of these witnesses is that they went down to Lamy, and brought her up here upon a subpoena; the respondent, I think, testified that he had a subpoena issued, and that he gave it to the witness Thayer. Thayer went for this woman, and brought her up. She was brought here at the expense of the defendants. The money was paid, I think, part by the respondent himself,—an amount which would be her legitimate fees, which she could have claimed, and which she would have been entitled to. She was brought to the office of the respondent Catron, and placed in a room there by Thayer. She remained there all night; took her meals there during the next day. She returned to that room after she testified in the court room on the trial; was kept there until the train went out; and was then put on the train, and sent home. The respondent Catron states that he had heard that she was a material witness and that he asked that she be sent for and brought here in order that he might see her; that she was subpoenaed as stated, and brought here; that he did not know she was in his office until the next morning when he found her there, and he asked her what she was doing in the office; that she said she had been brought up there by this man Thayer, who had brought her from Lamy; he then asked her what would be her testimony; that she said in reply that her testimony would be the same as it was on the preliminary trial. Respondent states that he said to her: "I don't remember what that was. Will you repeat it to me again?" She then sat down, and repeated to him her testimony substantially as she had given it upon the preliminary examination. He then left her, and went off, and engaged in other business connected with the trial of the case, and she was afterwards brought upon

the stand and testified. After her testimony in chief was through, and the prosecution announced that it desired time to get out the transcript of her evidence on the preliminary examination, before they could be ready to conduct the cross-examination of this witness. The respondent then announced that he would not be responsible further for her fees. This witness then went home, and in a few days came back, and went upon the stand, and denied positively the truth of the statement which she made upon two previous occasions, when put upon the stand as a witness. The respondent denies that any threat of any kind or character or any influence was used or attempted to be used upon this witness. I find that the testimony of this witness stands before us, denied in part by the witness Conklin, denied in part by the witness Spiess, denied in part by the witness Thayer, denied in part by the witness Domingues, and denied, in so far as any criminality is shown, by the respondent Catron himself. We therefore must say there is only one conclusion to which the court can come in examining this testimony with reference to the second charge or specifications,—that it is not sustained by the evidence.

The third charge is in reference to, and charges, that the respondent Catron had attempted to influence or control improperly the testimony of the witness Max Knodt, who was a witness for the prosecution on the preliminary trial of the Borregos, and that he obtained for him a pass to Wingate, as a means of inducing him to give improper testimony. This charge, I must say, is sustained in no part, except in the fact that respondent did obtain for the witness Knodt a pass to Wingate. The witness Knodt himself comes upon the stand, and testifies that he wanted to go to Wingate. He asked some person whether he could obtain a pass. He was directed to Mr. Spiess. Mr. Spiess directed him to Mr. Catron. Mr. Catron,

after a conversation with the witness, applied for a pass for him to Wingate. The witness says that Mr. Catron told him that he must be there at the Borrego trial; that the court would fine him $25 if he did not come. In this statement of the witness, he denies positively that Mr. Catron discussed his testimony in the Borrego case with him, or attempted in any way or manner to induce him, or to influence him, to conceal any part of his testimony, or modify or change it in any manner whatsoever. The respondent testified that he obtained the pass; that the witness Knodt applied to him for a pass to go to Wingate to see a lady out there, whom he desired to visit, who used to be a servant in Mr. Catron's house. Mr. Catron told him that he could not, probably, get him a pass upon that ground, but, if he could transact some business for him (Catron), that he might be able to obtain the pass for him. This statement of the respondent Catron we must prefer to the other, because it is not denied. No attempt or effort has been made to show that the statement of the respondent as to the reasons why he obtained the pass in behalf of Knodt is untrue. Therefore we must accept the statement of the respondent as true with reference to this fact, and I say that in view of the condition of the testimony, the third charge in reference to the witness Knodt is not sustained in any particular.

The fourth charge is based upon the testimony of Mrs. Baca, who is the mother of Luis and Mauricio Gonzales. Luis Gonzales and Mauricio Gonzales were two material witnesses for the prosecution in the trial of the Borregos. Luis Gonzales had testified upon the preliminary examination, and also was brought and kept as a witness to be used on the final trial. It is claimed in this charge that the respondent Catron sought, by the use of money, to induce this woman, who is the mother of these boys, to get them away

from the court, or to get them to modify their testimony or change it, or, rather, not to testify against the Borregos. She states in her testimony that she was going by the office of Mr. Catron, and he knocked on the window, raised it, and called her up to the office. She came up to the office, and in her conversation with Catron something was said with reference to her pension papers. She talked about the papers, and offered to pay Mr. Catron for his services in her behalf connected with the papers. Mr. Catron stated that he did not want any pay for the services he had rendered. According to her statement, all he wanted was for her to do something to aid and assist the Borregos. She said that he then offered to pay her money, give her assistance, be her friend, and give her help, if she would induce her sons to testify in behalf of the Borregos, or not to testify against them. This is the statement made by her. This conversation occurred in the presence of the respondent and this woman alone. Nobody else was present. Respondent goes upon the stand, and positively, without hesitation, and without qualification, denies wholly and absolutely this statement. So we have, so far as this charge is concerned, the testimony of the woman Mrs. Baca, on the one side, and the testimony of the respondent, on the other. Under our views of the weight which should be attached to testimony, and the amount of evidence which should be required to establish and sustain a charge of this kind, we conclude that under this testimony, taking these two witnesses as they stand before us, assuming them to be of equal credibility, the prosecution in this charge have wholly failed to sustain the allegations made.

Now, as to the fifth and last charge, that the respondent attempted, by the use of money and other means, to influence the witness Mauricio Gonzales to testify falsely or improperly in the trial of the Borre-

gos: The respondent Catron denies absolutely that anything of this kind was done; denies that he offered any money, that he agreed to pay any money, or that he offered any kind of inducement to this witness to testify falsely or untruthfully in any way in this cause. The testimony upon this point is not corroborated by any other facts or any other circumstances. Therefore we say that, under this testimony, even if the witnesses were of equal standing, this charge can not be sustained. It may be proper, however, in order to see and understand the weight which should be attached to the testimony which is offered by the prosecution in this case, to look at it for a moment. The testimony is that the woman, Mrs. Baca, upon whom the fourth charge is based, was a woman whose character was such as to render her unworthy of credit. The testimony shows, too, that the witness Luis Gonzales and the witness Mauricio Gonzales were witnesses of such character as to render them unworthy of belief. Prominent citizens of this community, officials in high standing, prominent members of the bar, reputable business men in large numbers, have come upon the stand, and have testified, without qualification, that they would not believe these witnesses under oath, in consequence of their character, their reputation, and their standing in this community. The witness Porfilia Martinez de Strong,—her testimony itself has furnished facts sufficient to mete out its own condemnation. She twice testified to one thing. She came upon the stand subsequently, and testified directly in the opposite way. Here we have a witness of this character coming upon the stand, testifying in directly opposed directions in the same case. Besides, the testimony which has been introduced with reference to character applies to her as well. The testimony of Mauricio Gonzales shows that he has been willing to make affidavit on both sides of the case. He testified in one

way, and then made an affidavit in another way. So that, having taken this testimony, and applied to it those rules which the court ought to apply in weighing testimony, giving to it that credit to which it is entitled, we must conclude that these charges are not sustained. It may be proper, also, to remark that these charges are five in number. Each stands by itself, a separate and distinct charge as to a separate and distinct act, alleged to have been done at separate and distinct times, with separate and distinct individuals. It is proper to say that the testimony in no one of these charges tends in any way to establish the truth of any of the others. Therefore, we must dispose of these charges separately, upon the testimony which has been offered applicable to that particular charge. Viewing it from that standpoint, and applying the rules above given to this testimony, we must conclude that this evidence is not of a character that commends itself to credit, and is not testimony such as we ought to disbar respondent upon.

As to the respondent Spiess, it is charged that he made a trip to Las Vegas, to see the witness Domingo Apodaca, who had been examined upon the preliminary trial of the Borregos, and that he endeavored to induce her to swear falsely in the Borrego trial. It was stated by the district attorney, in the opening of the Borrego trial, that he expected to prove a confession made by Francisco Gonzales y Borrego to this Domingo Apodaca; that the respondent went to Las Vegas with a knowledge of that fact, and had an interview with this witness, and in that interview he offered her money, offered her support, offered his protection as a lawyer, and the protection of his firm, if she would not testify against the Borregos. This is her testimony. In this respect the testimony of the witness Domingo Apodaca is denied by Mr. Ortiz, who says he was present at the entire interview which was held

between the respondent Spiess and the witness Domingo Apodaca in Las Vegas, and that no such conversation occurred. The respondent also denied the statement. So we have the testimony of these two witnesses against the testimony of the witness Domingo Apodaca. The other evidence with reference to her shows that she is a public prostitute. Her testimony, as I think, is of such a character as to cause the court to, at least, concede to it only a limited amount of credit; but against her testimony alone, uncorroborated, denied as it is by the testimony of the other two witnesses, which stands uncorroborated, we think that this charge with reference to the respondent Spiess is not sustained.

It is charged that the respondent Spiess offered money to Luis Gonzales; that he was in front of the postoffice; that he was met there by Gus O'Brien, and Gus O'Brien asked him if he did not want a job, if he did not want work. He said that he did, and went with Gus to the office of the respondents, Catron and Spiess. He went to the office, and Mr. Spiess was absent. Gus O'Brien telephoned to the Palace Hotel, and in a few minutes Mr. Spiess came in. Mr. Spiess spoke to him, and he spoke to Mr. Spiess. He says that he asked Mr. Spiess what he wanted. Mr. Spiess said that he wanted him to do something for him; that he wanted him to help him in the Borrego case; that he wanted him to make an affidavit that Gov. Thornton had offered him (the witness) money to swear as a witness in the Borrego case; that he would give him $10 if he would do so. Spiess sent Gus O'Brien into the other room to get the check book; that he brought out the check book; that he instructed Gus O'Brien to draw him a check for $10 for Gonzales, and offered it to him, to influence the witness in that case. The respondent's testimony is that this is not true. He denies positively that he offered him any-

thing, that he drew or had any check drawn, and denies that he wanted him to help him in the Borrego trial. The testimony upon this subject is the testimony of these two witnesses, the witness Gonzales, upon one hand, and Spiess, the respondent, upon the other. In the light in which we view the testimony of Luis Gonzales, and the credit which, in our judgment, it is entitled to receive, it is not such as to warrant us in finding the defendant guilty of this charge.

It may be contended that this conduct of the respondents in going to these witnesses, and talking to them, was of itself improper. It may also be contended that the sending for and the bringing of a witness here, in the manner in which they (the respondents) did with reference to the witness Porfilia Martinez de Strong, is improper and unprofessional conduct. If the record in this case contained testimony which could in any way establish the fact that the respondents brought these witnesses to their offices, or visited them with the view of in any way influencing their testimony, or if there was credible testimony showing that they attempted to tamper with any of the witnesses, then it would be our duty to find the respondents guilty. We can not, however, find from this evidence that such was the case. The vast importance of the trial in which the respondents were engaged, the intense public interest that was manifested and centered in its result, the bitter feeling of hostility which was engendered between the prosecution and the defense, led the respondents, as they say, to distrust the officers in serving their process for their witnesses, and caused them to have subpoenas issued in the case, and have them served by others outside of the regular officers, and caused them to bring some of their witnesses to their offices for consultation. We can not discover in their conduct anything which will warrant us in adjudging the respondents guilty.

The position of an attorney and counselor at law is that of an officer of the court. His relation to the court, the bar, and the public is one of trust and confidence. To his integrity and ability are not infrequently intrusted the lives, the liberty, and property of the citizen. Years of time, arduous labor, and constant application are required to elevate him to that professional standing which enables him to discharge with fidelity the responsible duties intrusted to his care. If dishonest practices and unprofessional conduct have caused him to forget his obligations, and led him to a violation of this sacred trust, his name should be stricken from the roll, and he should be removed from a place in the ranks of the profession which he is found unworthy to fill. But a result so humiliating in its effect and so disastrous in its consequences to him should not be reached upon circumstances that appear merely suspicious, but only upon that credible and convincing testimony which will lead with reasonable certainty to the establishment of his guilt. By the laws of the country and the sanction of the courts, he has been admitted to that profession to which the energies of his life may be devoted. His zeal and ability may have gained for him a position of eminence and distinction in his calling, and he has thereby acquired a right of property in the privilege of engaging in its practice. This right and privilege should not be destroyed or taken from him, and he be deprived of its benefits, and driven in humiliation and disgrace from the profession, unless upon reliable proof,—such proof as would be sufficient to satisfy the mind of the court in determining questions involving the liberty and property of the citizen.

Giving full consideration to all the testimony offered in this investigation, considering the credibility of the evidence, and the character, standing, and reputation of the witnesses presented in support of these

charges, each charge being supported by an uncorroborated witness, whose credibility is impeached, both by his own evidence and by independent proofs, —place this upon the one side, give to each portion of it that full weight and consideration to which, in the most favorable light, it should receive, place against this the open, frank, positive, and unqualified denial by the respondents of each criminating fact contained in the charges, apply to this conflicting evidence the test of those well-established rules by which its character and weight should alone be determined, weigh each part of it in that just and impartial scale which should ever measure and control judicial decisions, and we are led irresistibly to the conclusion that none of the charges and specifications against the respondents are sustained by the evidence, and they should be dismissed.

BANTZ and COLLIER, JJ., concur in the conclusion reached, but file separate opinions herein.

COLLIER, J.—In concurring in the conclusion of a majority of the court in this case, I can not assent to all that is said in the opinion of the court. It was announced at the time the judgment of the court dismissing the charges was rendered that some observations on certain practices indulged in by respondents would form a part of the opinion of the court. Many matters expected by myself to be adverted to are not contained in the opinion, or referred to either directly or indirectly. As to these I will not submit any views, because, as they in no way appear on the face of the record, I will not impart them for the mere purpose of giving an individual opinion.

The opinion does, however, contain some things I must express my dissent from. I do not believe that an attorney having a high sense of professional decorum and ethics would have permitted himself to visit

the witness Nowell, upon the plea that he honestly desired to ascertain what the witness would testify to, because he had stated to another in conversation a different state of facts from what he had already testified to. He could not rest upon the presumption that the witness would repeat his former testimony, and it was not the office or business of the attorney against whose client that testimony militated to give that witness any warning or advice as to the pains of perjury. The fact that witness could have testified in a certain way, and is told by the attorney of the client against whom that testimony bore that it would be shown that he made contradictory statements, is itself a threat tending to the suppression of testimony. The attorney should have relied upon his right to impeach the credibility of such witness according to the rules of evidence, and the practice of the courts, and I can not agree that I "discover no unprofessional conduct" in the respondent's visiting and talking with the witness Nowell. While I think his act was blameworthy, I do not think it such reprehensible conduct as deserves disbarment.

Other matters I do not care to advert to, except to say that I believe counsel should so bear themselves toward witnesses who are subpoenaed for the side to which they are opposed as not to give rise to the suspicion of improper influences being exerted; and I think that, so far as the witnesses Max Knodt, Domingo Apodaca, and Luis Gonzales are concerned, the respondents do not appear to have so conducted themselves as to ward off suspicion. If the two latter witnesses were of such unsavory character as the testimony of the respondents shows, and which the court takes as established, it were better for counsel to have kept aloof, instead of seeking one and being visited by the other, as is the case so far as respondent Spiess is concerned, it not being denied that Spiess visited

Domingo Apodaca, nor that Gonzales came to his office upon the request of his employee.

I have thought it my duty to say this much as to the concurrence I give to the court's opinion, because these matters appear on the face of that opinion.

BANTZ, J. (concurring).—It is a sufficient statement of reason for the conclusion reached in this case to say that whatever testimony there may be tending to sustain the substance of the charges comes from those who do not commend themselves to confidence, and such testimony can not outweigh that of men of respectable reputation.

LAUGHLIN, J. (dissenting).—This is an action brought on information filed in this court by Jacob H. Crist, as district attorney for the counties of Santa Fe, Rio Arriba, and San Juan, for the disbarment of the respondents, and to exclude them from the office, rights, and privileges accorded them as attorneys and counselors at law of this court.

In recording my dissent from the opinion filed by a majority of the court, and a dismissal of the charges filed herein against the respondents, it is done through a sense and an appreciation of the official responsibilities of the position and the obligations of my oath, and out of the respect and reverence I have for it, and the duty, respect and confidence possessed in me for the public and for the public interests involved and shown in this matter. Were my personal feelings and inclinations permitted to control over what seems to me to be an official duty which I owe to the position, and from which I am unable to see any avenue through which to escape, there would certainly be no dissenting opinion recorded by me in this particular and important case. To concur in an opinion by a majority of my brothers upon the bench, for all and in all of whom I have but the profoundest respect and confidence, is both

an easy and a pleasant duty, and one to which there is always a certain degree of pride and honor attached; but to dissent on the facts in a case of this nature and importance, and to justify that dissent, is a duty unpleasant in the extreme.

This case arose immediately out of a criminal prosecution in the district court of Santa Fe county, wherein Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia were indicted, tried, and convicted for the murder of ex-sheriff Francisco Chavez; and in making this statement it is proper and necessary, in order to understand fully all the facts and circumstances, to resort to records now in that court, which are not part of this record, but which are public and notorious facts throughout the territory. During the nighttime of May 29, 1892, said Chavez was assassinated in Santa Fe by parties lying in wait, four bullets having penetrated his body. For some time thereafter it was not known who the assassins were. During the latter part of the year 1893, W. P. Cunningham, then sheriff of Santa Fe county, obtained information from one Luis Gonzales, which led him to the discovery of the murderers of said Chavez; and in November or December of that year one Francisco Rivera made an affidavit before Judge Seeds, judge of the district court, sitting as committing magistrate, that said Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia and Hipolito Vigil were the guilty parties, and thereupon a warrant was issued, and placed in the hands of the sheriff, for their arrest, and all were immediately arrested, except Vigil, who resisted, and was shot and killed by the sheriff's posse. During January following, Judge Seeds, sitting as committing magistrate, heard the preliminary examination, which lasted some three weeks, and at the close held the said four defendants, and committed them without bail; and

at the sitting of the succeeding grand jury they were all indicted for murder in the first degree; and during May and June, 1895, they were placed on trial on the indictment, which continued about forty days, resulting in a verdict of "guilty as charged." Motions were made for a new trial and in arrest of judgment, and after an exhaustive argument in behalf of the motions they were both denied, and thereupon sentence of death was pronounced on the defendants, and error was sued out in their behalf, and the case is now pending in this court. Since the trial and conviction and the passing of death sentence by the court, two of the accused, to wit, Lauriano Alarid and Patricio Valencia, have confessed that all four of the defendants and the said Hipolito Vigil did commit the murder in the manner charged, and that the testimony given on the trial by the prosecution was substantially true. These confessions were in writing, signed and sworn to by two parties making them, and in the presence of a brother of one of them, and have been printed in the public press of the country, and have become a part of the public history of New Mexico. Chavez, by reason of his personal presence, his goodness of heart, and his kind and generous disposition, had attached many followers, not only of his political faith, but of the opposite faith as well, so that at the time of his assassination, and for a number of years prior, he was the acknowledged leader of his party, and much the strongest man politically in the county, and it was well known that he could elect or defeat any man he desired in local politics; and the testimony given at the preliminary hearing and on the trial on the indictment tended strongly to show that the primary motive for his assassination was political jealousy, a fear of his popularity and power, and an inordinate desire to remove him from the road of political preferment. I was of counsel for the prosecution at the preliminary hearing before Judge Seeds, and

was therefore disqualified; and by agreement of all parties Judge H. B. Hamilton, of the Fifth district, came to Santa Fe, and gave his most patient, painstaking, and laborious attention to the long, tedious trial, and pronounced the death sentence on the four convicted defendants.

The information in the nature of charges upon which this action is based was filed by Jacob H. Crist, as district attorney, and who as such prosecuted for the territory in the case for the murder of said Chavez, out of which trial this case directly grew, and the firm of Catron & Spiess appeared for the defense. Said information was filed at a former day of this term of the court, and the court took the same under advisement, and, after due consideration, referred the same to a committee of highly respectable members of the bar, to wit, J. P. Victory, of Santa Fe, as solicitor general of the territory; A. A. Jones, of Las Vegas; B. S. Rodey and W. B. Childers, of Albuquerque; and S. B. Newcomb, of Las Cruses,—with power and authority to investigate and inquire into the information so filed, and to prepare and file such charges and specifications, if any such should be required, as in their judgment might seem proper, and to prosecute the same before the court. At a subsequent day the committee filed charges and specifications, which are, in substance, as follows, to wit: (1) That the respondent Catron was guilty of unprofessional conduct in connection with said trial in this: That one Ike Nowell was an important witness to very material facts for the prosecution in said trial, and that he had testified as such witness at the preliminary examination of said defendants, in January, 1894, and that before he had given his testimony he had been tried and convicted of adultery under the laws of the United States, and that after he testified at said preliminary hearing he was sentenced to three years in the New Mexico penitentiary; and that while he was so

confined, and during the progress of the trial of said defendants on the indictment, said respondent, believing that said Nowell would be introduced and examined at said trial as a witness on behalf of the territory, went to the said penitentiary, sought and had an interview with said Nowell, and in said interview endeavored to persuade him to give different testimony, when he should be introduced as such witness, from that which he had given on said preliminary examination, and suggested to said Nowell that he might avoid testifying to the facts which he had testified to at said preliminary examination by declining to answer upon the ground that the answer might criminate him; knowing that the witness then and there claimed that the testimony given by him, said Nowell, on said preliminary examination, was true. (2) That the said respondent was guilty of unprofessional conduct in connection with said trial in this: That one Porfilia Martinez de Strong was examined as a witness on behalf of said defendants at said preliminary hearing, having then testified to material and important facts, and that she was so induced to testify by means of intimidation and fear, caused by threats and false pretenses exercised over her by certain agents of said respondent, who claimed and represented to her that they were sent by said respondent to bring her as a witness, as officers of the law, when in fact they were not such; and that she was again introduced as a witness at the trial on the indictment, and testified on her examination in chief to material facts in behalf of the said defendants; and that she was so induced to appear and testify by reason of fear and intimidation exercised over her by said respondent and his agents; that one Fred Thayer was sent to Lamy to bring her to Santa Fe, and that said Thayer represented to her that he was a deputy sheriff, and arrested and took her into custody and brought her to respondent's law office in the nighttime, and kept and

retained her in his private office the remainder of the night, and took her from there direct to the courthouse, and on the conclusion of her examination in chief (the district attorney declining at that time to cross-examine her until he could have her former testimony written out) took her directly back to said office, and retained her there until 10 o'clock that night, and then sent her home,—all of which conduct on the part of the respondent and his said agents tended to intimidate said witness; that she returned a day or two thereafter, and on her cross-examination testified that the facts which she had testified to at the said preliminary examination and on her examination in chief on said trial were false and untrue, and so given because of fear and intimidation as aforesaid, she being an ignorant and friendless woman. (3) That said respondent was guilty of unprofessional conduct at said trial in this: That one Max Knodt, a witness, testified to important and material facts on behalf of the prosecution at said preliminary examination, and was offered as a witness to prove the same facts at the trial on the indictment, but on said trial said witness testified differently, and in such manner as to render his testimony valueless to the prosecution on said trial; that said Knodt admitted on said trial as such witness that respondent Catron had promised to procure for him a railroad pass from Santa Fe to Fort Wingate and return at any time said Knodt should desire one, and did so procure a pass for said Knodt; that the procuring and giving said Knodt said pass was for the purpose and had the effect of inducing him, said witness, to change his testimony from that given on the preliminary hearing, and to render it valueless to the prosecution. (4) That said respondent Catron was guilty of unprofessional conduct in connection with said trial in this, that subsequent to the preliminary examination, and prior to said trial on the indictment, said respondent offered money

and other inducements to one Rosa Gonzales y Baca, mother of Luis and Mauricio Gonzales, two important and material witnesses in behalf of the prosecution, and by said offer endeavored to procure her to induce her said two sons to testify falsely on said trial on the indictment. (5) That said respondent was guilty of unprofessional conduct in connection with said trial in this, that he, subsequent to the said preliminary examination, and prior to the trial on the indictment, offered said Mauricio Gonzales money, and attempted otherwise to induce said Gonzales to make a false affidavit as to his information with reference to material facts about the killing of said Chavez by said defendants.

The witness Nowell, during the January, 1894, term of the United States court, held at Santa Fe, and at the same time the preliminary hearing in the case of the territory against the said Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia, which will hereafter be styled the "Borrego Case," was being had for the murder of said Chavez, was indicted, tried and convicted of the crime of adultery, in which respondent Spiess appeared as his attorney, and after the conviction, but before sentence was pronounced, he was offered as a witness by the prosecution in the Borrego case, and gave material and damaging testimony against the defendants, and afterward the court passed sentence, and fixed his punishment at three years in the New Mexico penitentiary. During the trial of the Borregos on the indictment, knowing the importance of Nowell's testimony, and that he had served nearly half of his time, I joined the governor, who had previously written fully all the facts, in a telegram to the department of justice, requesting a pardon for Nowell, that he might again give his testimony on the trial; and immediately upon the receipt of the telegram the president granted the pardon, and so notified the superintendent of the peni-

tentiary; and the testimony shows that during the next day after the superintendent received the notice of the pardon the respondent took a buggy and an employee in his office and drove, not by the usual way, but by a circuitous route, to the penitentiary, and there sought and obtained a private interview with Nowell, in which Nowell told respondent that he had been notified by the superintendent of his pardon, and that he was then a free man, and that the superintendent had requested him to remain until his clothes could be prepared, but that he did not know by whose influence the pardon had been secured; and the substance of that interview is here given as taken from the witness' mouth by the official stenographer, on his examination in chief:

"Q. How came Mr. Catron to see you? State it to the court, if you will. A. He came out there, and sent for me to come into the private office. I went up, and sat down on one side of the table, and he says—asked me how I was getting along; and he says, 'I don't want to— It is my business out here, that I don't want you to testify in this case,—the Borregos killing Chavez.' And I told him I didn't see how I could get round it. I says, 'I gave my evidence in the preliminary examination,' and I says to refuse to testify they would get me for perjury; and he says, 'No; they won't.' He says, 'I will tell you now what to do.' He says, 'You, when they ask you if you know the Borregos, you can tell them, "Yes,"' and he says: 'If they ask you if you know of how Chavez was killed, you refuse to answer the question. Just say it would incriminate you.' And I sat there for a while, and he says to me,—and I didn't pay much attention to it,—he asked me what I thought about it. 'Well,' I says, 'I don't know.' I says, 'I have had enough of this trouble, and I don't want any more trouble about it;' and he says: 'I will defend you. I will protect you. Do just as I tell you, and I will defend you.'

"Q. State whether he said anything about bringing an action against them for keeping you in the penitentiary at that time? A. He said I could bring an action against them.

"Q. How long had you been there in custody after you supposed you were entitled to be discharged? A. Just the evening before. That was on Saturday, I believe, and on the sixth day of May, and I was turned out on the seventh.

"Q. Did you know you were to testify before Mr. Catron came out to the penitentiary to see you? A. I was satisfied what I had been pardoned out for.

"Q. Well, when Mr. Catron called on you at the penitentiary, did he say his business relations with you were as your attorney in the adultery case? A. I believe he did.

"Q. What, if anything, did he have to say, when he called on you at the penitentiary? A. He asked me not to make any remark about his being out there. He says, 'If you are asked the question, you can tell them I was your attorney in this adultery case;' that I would make that statement.

"Q. What did you say about it to him? A. I don't remember what answer I did make."

On his cross-examination he testified in part, and pertinent to the issue, as follows, viz.:

"Q. Did you not testify, in your direct examination, that your understanding was that you were pardoned out of the penitentiary to be a witness in the Borrego case, here, this morning? A. I said I supposed it was that.

"Q. Didn't you understand that that was the price of your testimony? A. I had no such promise.

"Q. Now, is it not true that when Mr. Catron came out to see you at the penitentiary, that he said to you that you ought not to testify to falsehoods against the Borregos, or words to that effect; that you had

told Charlie Spiess that your testimony against the Borregos was false, and that you ought not to testify again against them? A. I don't think he ever said that. I never told Mr. Spiess so at all.

"Q. Did he say anything of like substance? A. He said something to that effect. I told him I didn't testify to nothing that was untrue.

"Q. Didn't you then say to Mr. Catron that Mr. Spiess was your attorney at the time you made this statement to him, and that Mr. Spiess ought not to use it, and that it would get you into more trouble? A. I don't remember any such conversation.

"Q. Didn't you say that the use of this matter, that you told Mr. Spiess when he was your attorney, had the effect to get a more severe sentence on you in your adultery case? A. I don't think I did.

"Q. Didn't Mr. Catron then insist that you should tell the truth in the Borrego case, as he understood it; and didn't you say that if you did they would get you for perjury? Didn't you ask Mr. Catron, in the course of that conversation, that if you gave testimony upon the second trial different from that you gave in the first trial, if they could not get you for perjury? A. I did.

"Q. And didn't he tell you that they could? A. He told me that they could not, if I did what he told me to do.

"Q. Didn't he say that they could not if you testified that it would criminate you if you testified? Did he not put that distinctly on the ground that your testimony on the first trial was false? A. He tried to make it appear that way.

"Q. Wasn't that the way he talked to you all the way through? A. No, sir.

"Q. That your testimony on the first trial was false? A. He did not.

"Q. Did he at any time intimate to you that he believed the testimony you gave on the first trial was true? A. He intimated that it was not true.

"Q. Didn't he insist that your testimony on the first trial was false, and that you knew it was false? A. He didn't say that I knew it was false.

"Q. Didn't he say to you, when you asked him if you gave testimony on the second trial that was different from that you gave on the first trial, that they could not get you for perjury? Didn't he say that they could, unless you testified that your testimony would tend to criminate you? A. I asked him if I was going to make different evidence, if I did as he wanted me to do. I said, 'If I did that, could they get me for perjury?'

"Q. What did he say? A. He says, 'Answer the questions as I told you, and decline to answer the others.'

"Q. That is, to decline on the ground that it would incriminate you, or tend to criminate you? A. Yes, sir.

"Q. He then said to you that if upon that trial you did decline to answer, upon the ground that your testimony would tend to criminate you, that he would protect you? A. Yes, sir.

"Q. He made no suggestion to you upon that occasion that you should give any sort of testimony on the Borrego trial, did he? A. That I should give none; that I should give no evidence in the case.

"Q. And he put that distinctly upon the ground that if you did testify to the truth, as he understood it, that you would lay yourself open to an indictment for perjury? A. I don't recollect that he did.

"Q. Do you recollect that he did not? A. The way he said was, 'Now, if you go and testify in this case, you will be indicted for perjury, because these Borregos are liable to come clear, and then they will get you for perjury.'

"Q. Didn't you ask him, Mr. Nowell, and have you not said that you did ask him, that if you gave

different testimony on the second trial from what you gave on the first trial, could they not get you for perjury? A. I did.

"Q. Didn't he tell you then to decline to answer, upon the ground that your answer would tend to criminate you? A. I don't recollect that he asked me that way.

"Q. Did he say anything like that? A. He told me if I answered these questions different from what I did before, they would get me for perjury. He says, 'You do as I tell you, and you will not be indicted for perjury,'—just about them words.

"Q. Didn't you ask Mr. Catron the question on that occasion, that if you gave different testimony on the second trial, if they could not use your testimony on the second trial, one against the other, for the purpose of indicting you for perjury? A. I did not."

In explanation of his visit to the penitentiary, and his version of the interview with the witness Nowell, respondent testified as a witness in his own behalf, on his direct and cross-examination, as follows, to wit:

"A. I heard Ike Nowell's testimony on the preliminary examination, and I heard the cross-examination of him by Mr. Spiess; and Mr. Spiess also informed me that, in a conversation with Ike Nowell, Ike had told him he knew nothing,—nothing tending to connect the boys, the Gonzales boys, in that case, with the killing of Francisco Chavez. Substantially his testimony was the same as what he testified here this morning himself. I said there was a possibility that Ike Nowell was to get a pardon, so that he might be brought on the stand to testify in that trial. I went to the penitentiary to see him and find out what his testimony would be; the circumstances being different, under which he was to testify here, to those under which he testified in the preliminary examination. At the time he testified in the preliminary examination he

had been convicted of the crime of adultery. His sentence was suspended in order that he might testify in that case, and he testified under the influences existing then as to the punishment that might be imposed upon him, as I understood it. Then I went to see what would be his attitude with reference to the two statements he had made,—the one to Mr. Spiess, as Mr. Spiess has represented, and the one in his testimony, they being diametrically opposed. I went to the penitentiary and requested to see him. He was brought into the room, and I spoke to him, and he said that he understood that I wanted to see him. I informed him that I had come to see him with reference to his testimony, in case he should be called as a witness in the Gonzales y Borrego case. I said to him that he had made, as I understood it, two different statements,—one on the stand as a witness in the preliminary hearing, and the other to Mr. Spiess, in regard to the connection of the Gonzales y Borrego boys with that killing,—and that they were contrary to each other, or conflicting with each other; that to Mr. Spiess he had said that he knew nothing to connect them with it, and in the other he stated facts which would tend to connect them. I asked him which of these two statements was true. He said the one he had made to Mr. Spiess was true. And then I said to him. 'If you are called on the stand, which are you going to testify to,—the one that is true or the one that is not true? He said that when he gave his testimony before the preliminary examination that he was in a 'close place' or 'tight place;' that he gave the testimony the way he did because he hoped it might influence the amount of punishment which would be placed on him, and help him in that regard; and Mr. Spiess having cross-examined him on that matter, and shown a different statement, he thought that the use of it in cross-examination had rather injured him, and caused a heavier pun-

ishment to be put on him. I said to him: 'Which are you going to testify to now, the truth or the untruth?' He remarked this way: 'I don't wish to do anybody any harm. I have had enough of this affair.' He said: 'If I go on the stand and testify to what I told Spiess,' he says, 'can't they use it against me in a prosecution against me for perjury?' I remarked to him: 'Certainly, if you testify differently from what you did before. One lot of your testimony can be used against the other,'—or words to that effect. 'But if you go on the stand you ought to tell the truth if you testify at all.' Then he says, 'How can I get out of telling what I said before if I tell the truth?' I said: 'You must not, if you go on the stand, tell anything but the truth. If the truth will help to convict you of perjury, why, there is only one way I see how you can get out of telling it; that is, that your answers will tend to criminate you. I must insist that if you go on the stand, that you tell the truth, if you testify to anything.' He said something, I think, about seeing me again, or something of that kind. I believe that is substantially what took place. I don't pretend it is literally the words.

"Q. State whether or not during that interview with Nowell you endeavored to persuade him to change his testimony on the approaching trial, in any other manner than what you have now described? A. I did not."

Cross-examination: "Q. When you went to the penitentiary to see Ike Nowell, how did you go, Mr. Catron? A. I went in a buggy.

"Q. Who went with you? A. Gus O'Brien.

"Q. What direction did you go? A. We went up this street that goes in front of the Cathedral, turned down, and went across what is called the 'San Miguel Bridge,' there in front of the San Miguel College, and took a cross street.

"Q. That is not the usual route to the penitentiary, is it? A. I don't know that it is the usual one. It is the one I took on that occasion.

"Q. You knew as a matter of fact, before you went, that Ike Nowell had already been pardoned? A. No, I didn't know.

"Q. Hadn't you understood that the pardon had actually been granted? A. No.

"Q. Didn't you state to him while you were there that he had been pardoned? A. I may have stated that Col. Bergmann had informed me that he had received a telegram that he had been pardoned.

"Q. The conversation was entirely private? A. Yes, sir.

"Q. You had cross-examined Ike Nowell on the witness stand on the preliminary examination,—he had testified, hadn't he? A. I had examined him partly in regard to that matter. I think I examined him in part, but not with reference to his connection with the Borrego matter.

"Q. But it was taken down in shorthand, and written out for the purpose of being used on the Borrego trial? A. I understand it was.

"Q. You had read it, hadn't you? A. I don't know whether I had or not. I was present when the cross-examination took place.

"Q. You talked with Mr. Spiess fully as to what Mr. Spiess claimed had been that conversation between him and Nowell prior to the preliminary examination? A. Yes, sir.

"Q. Pointed and direct questions had been directed to Nowell on that preliminary examination? A. I think so.

"Q. And he answered positively that he had no such conversation with Mr. Spiess? A. My recollection is, in a general way, that he denied substantially that he had any such conversation with Mr. Spiess. As to whether he denied specifically, I don't know.

"Q. Had Mr. Spiess taken the witness stand and contradicted Mr. Nowell on the preliminary examination? A. If he did, I don't know. I wasn't there.

"Q. When you went to the penitentiary you knew that, didn't you? A. If Mr. Spiess testified, he testified when I was not there.

"Q. You knew that Mr. Spiess claimed Nowell had been put on to testify, and was asked about the conversation with Spiess? A. Yes, I knew that.

"Q. You knew that, from Mr. Spiess himself, that he would take the witness stand, and contradict the testimony of Ike Nowell, if he testified in the main trial? A. Before, in the preliminary examination, I supposed he would.

"Q. As a matter of fact he did take the witness stand on the main trial, and contradicted Nowell? A. I think he did, but I am not positive about that."

A careful comparison of the testimony of respondent with that of Nowell will disclose a substantial variance in two or three important particulars only. Respondent testified: "I said to him that he had made, as I understood it, two different statements,—one on the stand as a witness in the preliminary hearing, and the other to Mr. Spiess, in regard to the connection of the Gonzales y Borrego boys with that killing,—and that they were contrary to each other, or conflicting with each other; that to Mr. Spiess he had said that he knew nothing to connect them with it, and in the other he stated facts which would tend to connect them. I asked him which of these two statements was true. He said the one he had made to Mr. Spiess was true. And then I said to him, 'If you are called on the stand, which are you going to testify to, the one that is true or the one that is not true?'" Then he gives his version of Nowell's reply, and again repeats to the witness, "Which are you going to testify to now, the truth or the untruth?" These are the only sub-

stantial contradictions of Nowell. In answer to the last question on his examination in chief, "Did you endeavor to persuade him to change his testimony on the approaching trial in any other manner than you have now described?" he said, "I did not." Nowell, in answer to the question, "He made no suggestion to you upon that occasion that you should give any sort of testimony, on the Borrego trial, did he?" says, "That I should give none; that I should give no evidence in the case." Nowell is, it appears, corroborated in many important particulars by the respondent's own statements, and he stands uncontradicted in the following answers, to wit: In answer to the question, "What did he [respondent] say?" Answer: "He said, 'Answer the questions as I have told you, and decline to answer the others.'" And then, after the question if that was not put distinctly on the ground that if he testified to the truth, as respondent understood it, that witness would lay himself open to an indictment for perjury, witness said: "I don't recollect that he did. * * * The way he said it was, 'Now, if you go and testify in this case, you will be indicted for perjury, because these Borregos are liable to come clear, and then they will get you for perjury.'" And again, to the question, "Didn't he tell you then to decline to answer, upon the ground that your answer would tend to criminate you?" This answer is: "He told me, if I answered these questions different from what I did before, they would get me for perjury. He says, 'You do as I tell you, and you will not be indicted for perjury,'—just about them words." And to the question, "What, if anything, did he have to say, when he called on you at the penitentiary?" This answer is: "He asked me not to make any remarks about his being out there. He says, 'If you are asked the question, you can tell them I was your attorney in this adultery case;' that I should

make that statement." These are material parts of the testimony, and stand as true, if the witness is worthy of belief.

But there is still another phase in this witness' testimony. It was well known that his evidence was considered very damaging to respondent's case, and much interest and anxiety was displayed concerning him and his whereabouts. The hearing of these charges was set the first time for the seventh day of October last, and it was a notorious fact that Nowell had left the territory, and gone to Trinidad, Colorado. The committee secured a subpoena for his appearance and that of other witnesses then at Trinidad on the day set for the hearing, and directed it to be served by the United States marshal for that state; and about the first of October one Page B. Otero, who, up to a few days prior to that time, had been one of the most efficient and active officers of the county in securing testimony against the Borregos as one of sheriff Cunningham's deputies, and one of the posse which was compelled to kill Vigil while resisting the arrest, secured a loan of $50 from the respondent, boarded the train the same day and went to Trinidad, and there had an interview with Nowell and the other witnesses about this case, and advised Nowell to disobey the subpoena, and offered to give him sufficient money to pay his railroad expenses to Texas, and offered to secure legal advice in Trinidad to convince him that he need not come on the subpoena issued by this court, and said to witness: "I understand you are subpoenaed in the case of Catron and Spiess, and you need not answer that subpoena. I saw the lawyer, and also telegram from the old man,"—who the witness supposed to mean the respondent; and said to the witness, "If you don't want to answer this subpoena, just keep out of the way until Cunningham leaves town." Witness further says: "His business up there was to

see me." He says, "We don't want you to appear;" "that if he [witness] did come, he would get the worst of it;" and that "we have all the other witnesses fixed;" and that he (Otero) asked witness to write a letter to district attorney Crist, and explain that he (witness) was drunk when he testified, and to give him (Otero) a copy of the letter, etc. Otero contradicts substantially all this conversation, but Nowell's statement bears the stamp of truthfulness more than does Otero's contradictory statements; and Otero returned to Santa Fe on the same train with Nowell and other witnesses for the prosecution. The telegram referred to by Otero is in evidence, and is as follows, to wit:

"TRINIDAD, COLO., Oct. 4th, '95.

"T. B. CATRON, SANTA FE, N. M.:

"Has clerk of our supreme court power to issue subpoena in proceedings against you for witness residing in Colorado? If so, how must service be made? Wire full instructions.

"[Signed] P. B. OTERO."

To this telegram the following reply was sent:

"SANTA FE, Oct. 4th, 1895.

"P. B. OTERO, TRINIDAD, COLO.:

"Clerk of the supreme court has no right to issue subpoena to run into Colorado. No one is authorized to serve such; and it is void.

"[Signed.] T. B. CATRON, Ch. T. B. C."

These telegrams are sufficient to support, in substance, Nowell's testimony as to the conversation he had with Otero in Trinidad, if he needed any support, as against Otero. The respondent testifies positively that he had no previous understanding with Otero in reference to his mission to Trinidad, and did not know at that time that Nowell was there, and that he made Otero the loan as a mere matter of business accommodation; and that he did not know that the witness referred to in the telegram meant Nowell. The proof

also shows that other friends of the respondent approached Nowell on the streets and in saloons, after his return to Santa Fe, and warned him not to testify against respondent, but there is nothing to show that respondent authorized or knew anything about his friends approaching the witness.

The second specification refers to the witness Porfilia Martinez de Strong. This witness gave testimony in the Borrego case, on the preliminary examination, which would, if true, have impeached and completely destroyed that given by Luis Gonzales, a very material witness for the prosecution; and at the trial on the indictment, she again gave, in her examination in chief, substantially the same, but was not then cross-examined by the prosecution, but returned in a day or so afterward,—as she testifies, of her own volition,—took the witness stand, and stated that all she had previously sworn to at the preliminary hearing and on her examination in chief at the trial a day or so before was false, and that she had been so induced to give false testimony through fear and intimidation. If the testimony of this witness alone was to be weighed in the balance as against that of the respondent, it would be an idle use of time to consider it; but there are circumstances connected with and surrounding this part of the case which can not in justice to the subject be passed over unnoticed. When the time came for her appearance in the trial, one Fred Thayer, whose occupation has not been clearly defined, went to the witness' home, in the nighttime, some eighteen miles from Santa Fe, and read to her what she seems to have understood as a warrant for her arrest, but which in reality appears to have been a subpoena, put her on the train, brought her to Santa Fe about 12 o'clock at night, and, instead of taking her to the home of a friend or to a public hotel, lodged her in the private office of the respondent, and furnished her a bed, where she passed the

remainder of the night, and where said Thayer furnished her with her meals, and where she remained all the time except while at the courthouse as a witness. But respondent says, in his testimony, that this was done without his knowledge or consent, and I do not think there is anything to show to the contrary. I do believe, however, that she was induced to give false testimony, and that she gave it through fear and intimidation, but not through the advice, knowledge, or consent of respondent, but through the aiders and abettors of the said four defendants.

But, during the pendency of these charges, the testimony shows, the respondent drew up a long typewritten affidavit, stating, in substance, that all that this witness had testified to at the preliminary hearing and in her testimony in chief on the trial was true, and that all she had testified to on her cross-examination on the trial was false, and that she had been so induced to testify falsely through intimidation and fear, and gave the same to one Roman Garcia, a friend to his clients, and sufficient money for his proper expenses, and told him to have her sign and swear to it, and then return it to him, the respondent. Afterward this affidavit fell into the hands of the prosecution. That witness (Garcia) testifies as follows, to wit: "I went to the office, and he [respondent] was there, and he took me into another room, where he and I were alone; and he asked me if I could go to Lamy and speak to Porfilia [the witness], and I told him I could. He said, 'don't go to-day, because I am afraid Cunningham is around there; and when you do go, be careful of Pedro Carriaga. Come to my office about 4 o'clock in the afternoon.' I went about 5 o'clock. My father was there with me. He asked me again if I wanted to go. I told him I did. Then he took me into another room, where Bob Gortner was, and he commenced to prepare that paper [the unsigned affidavit]. He then said, 'here is

this paper; translate it into Spanish, and bring me the English.' Then he said to me that I was in danger of being put in the penitentiary. He gave me the paper, but didn't say anything more to me. I left the office, and afterward returned and asked him when I should go. He told me to go about 9 or 10 o'clock, to his house. The following day (Sunday) I went to his house, and found him. He pulled out five dollars, and gave them to me, and told me to go and endeavor to get Porfilia to sign that paper. That is all that occurred that day."

"Q. Did Mr. Catron give you any instructions as to what efforts you should make to obtain the signature of Porfilia Martinez de Strong? A. That is all he told me—to try and get Porfilia to sign the paper.

"Q. State whether or not, when Mr. Catron gave you this paper which I showed you a while ago, he gave you instructions as to the length of time you should remain down there in the getting of this affidavit, if necessary. A. All he said to me was that I could stay two, or three, or four days."

It appears that Garcia did not go to Lamy, or take any steps to procure the signature of the witness to the affidavit, and that on a subsequent day he was called to the office of respondent; and he says, "Mr. Catron asked me where the paper [affidavit] was. I told him that Messrs. Cunningham and Crist had it. Then he asked me if I had promised to state anything in court. I told him I had not." Two or three days before the witness testified, he says he was again sent for, and went to the office of respondent, and learned that he was at the hospital at dinner; and an employee in the office took him there, and that respondent "said to me, what was I going to testify in the court? If I wasn't going to state that I had promised the affidavit of Porfilia; if I didn't state to him that I would go and see Porfilia and get her to sign that? I told him yes. Then

he said, 'you be careful of what you are stating before Gus.'"

"Q. What did Mr. Catron say to you when he first came into the parlor? A. I am not sure what he said to me first; but he said, 'is it not true that you promised me Porfilia's affidavit or oath?' That is what he said,—and if I was going to testify to that? And I told him yes.

"Q. State whether or not it was true that you had promised Mr. Catron Porfilia's affidavit. A. Never.

"Q. State why you made the statement which you have just made, to Mr. Catron. A. In order not to delay any longer there. * * *

"Q. State whether or not, prior to the time that you went into Mr. Catron's office, when you went to get that affidavit and since the trial of the Borrego case, you had any conversation with Porfilia Martinez de Strong in regard to her testimony. A. No, sir.

"Q. State whether or not you had had any conversation with Mr. Catron, in regard to the testimony of Porfilia Martinez de Strong, prior to the time he called you into his office and wanted you to get Porfilia to sign that affidavit. A. I have had no more conversation than what I have stated."

This witness seems to be a young man of excellent reputation, and his testimony is uncontradicted in every particular, except by the respondent, and he testified that he and his father are close personal and political friends of the respondent. In reply and explanation to this testimony, the respondent testifies as follows, to wit: "The father of Roman Garcia and some other gentlemen—I don't remember now who—came to me, and informed me that this woman had been induced, as they understood, to change her testimony by a promise to release her from jail, and stated that she had been brought back at the time she came back and was cross-examined,—that she had been

brought back on a warrant for a violation of a city ordinance, and that she had been released from jail on a promise that if she would give testimony they would not enforce that warrant against her, and that she was willing, as they said, to make an affidavit to that effect, and also to a contrary effect of what she had testified to before the examination, wherein it differed from the other examinations. They suggested to me that if I prepared an affidavit to that effect they could send it down and have it signed. I prepared an affidavit to that effect, a copy of which, the original of which I dictated to Mr. Gortner. I saw it in the newspaper. I don't know whether it has been offered in evidence yet or not. I prepared that. Then Mr. Garcia said his son would go down and get it signed, as he was acquainted with her. I told him to come with his son to receive the copy of the affidavit. He came there in person, and I delivered the affidavit to his son, in his presence, stating to the son to explain this affidavit to this woman,—translate it into Spanish (he said he understood English well enough to do so), so that she could thoroughly understand it. If she said it was true, to have her sign it. If she said it was not true, 'don't get it signed, but bring it back to me.' He said he had no means of paying expenses, and that the woman might be away from Cerrillos, and I gave him five dollars to pay his expenses while he was gone to get that affidavit. I expressly said to him that he must not offer her any inducement in the world, nor make any promises to her, and that the affidavit must be entirely voluntarily given, and what she said must be true, and that no influence, no efforts, and no promises must be used to get her to make the affidavit."

The third specification relates to the testimony of one Max Knodt, who gave very positive and important testimony against the defendants in the Borrego case, on the preliminary hearing, before Judge Seeds. On

this hearing, this witness gave strong and damaging evidence, which tended directly to connect the defendants with the killing of said Chavez,—that he had seen and recognized some of the defendants going in the direction of the place of the homicide, only about half an hour or so before the assassination occurred; and he was consequently regarded as a most important witness for the prosecution, especially as he appeared, in the preliminary examination, to be an honest and disinterested witness. Just prior to the trial on the indictment, he suddenly became very reticent, and talked with much reluctance to the prosecuting attorney about the facts he had previously testified to, and on the witness stand at the trial his memory finally slipped from under him, and his testimony became valueless to the prosecution. It was then discovered that the respondent had procured a pass for him over the railroad from Santa Fe to Gallup and return, and the following letter, after many efforts by the prosecution to obtain it, was offered to sustain the charges by the prosecution:

"SANTA FE, NEW MEXICO, May 10, 1895.

"HON. C. N. STERRY—

"DEAR SIR: I am compelled to either go or send an agent out to Gallup, on some business of my own. I am tied up at present in the trial of the alleged Francisco Chavez murder case and can not get off, while the business I have out there is urgent, and I must send an agent to represent me. Will you kindly do me the favor to send me a pass for Max Knodt from Albuquerque to Gallup and return, good for 30 days? I will deem this a favor, which I will be glad at some time to reciprocate.

"Very truly, &c.,

"T. B. CATRON, Att'y for S. P. R. R. Co.

"HON. C. N. STERRY, Genl. Counsel,
Albuquerque, N. M."

The respondent gives the following explanation of his connection with this matter, to wit:

"Q. State whether or not the procurement of the pass for him has any reference to the trial of the Borregos. A. None in the world. Mr. Knodt came to me and stated that he wanted to go to Fort Wingate to see a girl who had formerly been in my employ, with whom he had got acquainted while she was living in my house (she was cooking for me), and asked me if I could not procure him a pass. I informed him that for such a purpose as that I did not think I could secure him any, and I said, 'I have some business which will call me to Gallup, and if you can possibly attend to it,—it is to get some papers from a party in Gallup to whom I had been writing,—and if you will go on and attend to that for me, I can represent that you are going on business for me, as I will have to go myself, otherwise; I can't get it on that ground for you.' He said he would be willing to go on and attend to it, so I wrote a letter to Capt. Sterry asking a pass for him, stating that I wanted him to go to Gallup and attend to some business for me. I didn't hear from that letter at all. That letter was written some time in May,—I think the tenth of May. I didn't hear from the letter until some time in June, when I received a letter from Mr. Sterry stating that he had been absent from Albuquerque when my letter came, and asking me whether I still desired him to send the pass, and I answered the letter which has been given in evidence, I think dated June 4, and after that the pass was sent to me, and turned over to Max Knodt. There was only one pass obtained." This is indeed a most remarkable coincident,—that this man's memory should remain so perfect and retentive at the preliminary hearing, which occurred nearly two years after the homicide, and then, in a little more than a year after that hearing, and after it had been

refreshed by a rigid cross-examination under oath, it should fail him, and that, too, at just about the time when respondent says witness applied to him for his influence to assist him in securing the pass, and who was one of the attorneys who cross-examined him in the preliminary hearing. That this witness was "tampered" with there can not be a shadow of a doubt. But it is not here contended that respondent did it, because he swears positively that he did not, but as to whether it was done with his advise, knowledge, or consent the record does not disclose. But the idea that the respondent constituted Max Knodt, at that particular time and under the peculiar circumstances, his authorized agent to go to Gallup and "get some papers from a party" there, which he said he had been unable to obtain through correspondence (but which it appears he did obtain in that manner), is a subterfuge of the most transparent character; and it is but due respondent to say that he has too much respect for this court to expect it to give one minute's serious consideration to such a statement; else why did he fail to show authority in Knodt to receive "the papers?" why did he fail to give the name of "the party at Gallup?" These matters could have been shown, if the statement was true about the agency. He was simply driven, for an explanation of the "pass transaction," to the old maxim that "necessity is the mother of invention."

The fourth specification charges, in effect, that the respondent offered one Rosalia Gonzales y Baca money, and otherwise tried to induce her to secure of her two sons, Luis and Mauricio Gonzales, affidavits which, in effect, would destroy their testimony in the then approaching trial of the Borrego case, on the indictment; both said Luis and Mauricio being very important and material witnesses for the prosecution in that case, and the said Luis having testified at the preliminary hearing, and said Mauricio being subpoenaed,

but was not called as a witness. That part of the testimony of this woman pertinent is as follows, to wit:

"Q. Just tell what happened. A. I was going to church, when he [respondent] knocked at the window, and motioned this way, and told me to come upstairs. I went upstairs, where he was, and he inquired of me what I was doing with reference to the record or pension of my husband. I told him I was making an effort to get the reward, and would pay him the money when that came. He said no, that all he wanted was that Luis and Mauricio should come and make a declaration in favor of the Gonzales y Borregos. I told him that I didn't command my children. I told him that I would not meddle in my sons' affairs; that I didn't command them. Then he told me not to say anything to Luis or Mauricio. Then he said to me that he could give me money if I desired; that he could aid me whenever I was in need, if I so desired. That is what he said to me."

The respondent's testimony on that point is as follows, to wit:

"Q. If you had any interview with her in your office in connection with any other business, state the particulars of it. A. I had an interview in my office with her, two of them. She came up to my office with her son Catalino, and represented that her husband had been a soldier during the war, and she had made application for a pension. Mr. Read, she said, was her agent and attorney, and would like for me to aid her so far as I could, as delegate to congress. I interrogated her as to her husband's being connected with the army. I knew her husband, had known him during his lifetime, and as far as I could get from her the character of pension she had applied for, judging from what she said, it was under the dependent pension act. I said to her, 'I will write a letter to the commissioner of pensions.' She said the application

had been made a long time, and was being delayed, and that she could not hear from him, but she would like for me to write and hurry it up as soon as possible."

And says he did not in any way attempt to induce her to secure the affidavits of her two sons, Luis and Mauricio, in favor of the Borregos.

The fifth and last specification is to the effect that the respondent offered said Mauricio Gonzales money, and otherwise attempted to induce him to make an affidavit that he was not at or near the place of the killing of said Chavez, during the night that the homicide occurred. To sustain this charge the said Mauricio was offered as a witness, and he first testified, in substance, to the effect that he was called to the office of respondent, and there offered money and otherwise induced to make such an affidavit, as alleged, but that he had declined to do so. The respondent then offered in evidence, for the purpose of contradiction, and to destroy the testimony of the witnesses, the following affidavit, to wit:

"Territory of New Mexico, County of Santa Fe. Mauricio Gonzales, being first duly sworn, upon his oath says that he is twenty-three years of age; that he is a resident of Santa Fe county, and has been all his life; that he is a brother of Luis Gonzales, also a resident of said county of Santa Fe, and that he remembers the night on which the late Francisco Chavez was shot and killed, at or near the Guadalupe bridge, said Francisco Chavez being the same man who had formerly been sheriff of Santa Fe county; that on that night he came from his house to the plaza of Santa Fe, about 6 o'clock, when he returned to his home, being a house of the same Francisco Chavez, on the north side of the Santa Fe river, near the house of Mr. Schormeyer, and in the same square or block with the house of Mr. Schormeyer, and remained there the

whole of the night, and did not further go out.' He further states that at no time on the night when Francisco Chavez was killed did he cross the Guadalupe bridge with his brother Luis; that he was not on the Guadalupe bridge during the whole of that night, or nearer to it than two hundred yards or more; that he did not hear any shots fired, nor was he where he could see, nor did he see, any persons at or near the south end of the Guadalupe bridge, armed or otherwise, nor did he go by such place, any time during the night, with his brother Luis; that if his said brother Luis has stated that he was with him on that night at any time, or that he crossed that bridge with him, or that they saw any men standing near the south end of the bridge, or that any shots were fired in the presence or hearing of affiant, at or near said bridge, he is entirely mistaken, as affiant was nowhere near that place at any time during that night; nor was he at any time during that night in company with his brother Luis; and that he never at any time saw any of the defendants, Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Patricio Valencia, or Lauriano Alarid, at or near the south end of said bridge, standing there, either on a level with the bridge, or down on either side of it; that he never at any time heard any shots fired at or near said bridge, and never at any time crossed said bridge with his brother in the nighttime; that he knows nothing whatever about the killing of Francisco Chavez, or who was connected with the killing; nor does he know of any fact which cast suspicion upon anyone as to who killed said Francisco Chavez, or as to what the facts of his killing were. Affiant further states that he makes this affidavit freely and voluntarily, and without any threats or compulsion whatever, and without any reward or offer of reward or hope of reward for the same; that he does it without any consideration

whatever, and uninfluenced by anything except a desire to tell the truth.

"MAURICIO $\overset{\text{his}}{\underset{\text{mark}}{X}}$ GONZALES.

"Subscribed and sworn to before me, this 1st day of October, A. D. 1895.

"WILLIAM E. GRIFFIN,
"Notary Public. [SEAL]

"Witnesses to signature:
"CLARENCE KEY,
"R. C. GORTNER."

The witness in the afternoon returned into court, and asked leave to again go upon the stand for the purpose of correcting his testimony given by him in the forenoon, and was then permitted to so do; and upon the witness stand stated that he so returned of his own volition, and without advice from anyone, and on being shown the affidavit admitted that he did sign and swear to it. He then stated that, when he was called to the office of respondent, the respondent directed his clerk to prepare a paper of some kind, as he understood him to say, and to have witness sign and swear to it; that the respondent then left the office, and witness remained until the same was prepared and presented to him; that he signed it, but that it was not read to him in Spanish, and that he (witness) understood very little or no English, and that he did not understand the purport and contents of the same. Respondent replied to this as follows, to wit: "I had been absent from Santa Fe just prior to the first day of October, some days, and I came to the office on the morning of the first of October, and Gus O'Brien, who is the office boy for me, informed me that this Mauricio Gonzales had been at the office two or three times, stating that he wanted to make an affidavit that Luis Gonzales' testimony was false, as he gave it on the preliminary examination. I said to him, 'If he wants to make it, all right,' and he

said that Mauricio wanted to see me to get me to draw it up. I told him if he saw him to tell him to come up, and I would talk with him about it. A short time afterward, during the day, he came up with O'Brien, and O'Brien said, 'There is Mauricio,' and that he wanted to talk with me about the testimony of Luis Gonzales. I asked him what he wanted to say, and asked him several questions, and he gave me the facts as set out in that affidavit, and he stated that he wanted to make an affidavit as to those facts, and asked me to write it out for him. I wrote it in pencil, and handed it over to Mr. Gortner, my stenographer, and asked him to have it typewritten, and I said, 'When you have it written, have Mr. Key to translate it to him in Spanish, and get someone to swear him to it, if he says it is true, and wants to swear to it.' I was not there when he swore to it, and was not there when it was translated to him. That is all that occurred while I was there. I went out of the office, and when I came back into the office they told me it had been translated to him, and that he had sworn to it, and showed it to me."

This woman Rosalia Gonzales y Baca, it appears from the record, had three sons, Catalino, Luis, and Mauricio, all of whom were subpoenaed as witnesses for the prosecution at the preliminary examination, and at which Catalino and Luis testified to very damaging facts against the defendants, but to a different state of facts which occurred at different times and places, but Mauricio was not called, because it appeared in this proceeding that he, at the time of the preliminary examination was going on, was arrested by the city marshal, brother of one of the defendants, charged with having a deadly weapon on his person, and was confined in the city jail, was fined, appealed to the district court, where he was again found guilty, and sentenced to serve his sentence in the jail, and was so confined and serving out his sentence when the Borrego case was tried on the indict-

ment. To show the importance of the testimony of said Luis, the following is taken from the testimony of respondent, on cross-examination in this case, to wit:

"Q. Mr. Catron, on the trial of this Borrego case, this man Luis Gonzales was the most important witness for the territory, wasn't he? A. I think not.

"Q. Wasn't he the only witness introduced by the territory on the trial of the case who testified that he saw these defendants near the place,—near the bridge where the shots were fired,—and that he heard the shots? A. No.

"Q. What other witness so testified? A. Francisco Rivera, in my opinion, was a much more important witness for the territory. Francisco Rivera didn't say he saw the shots, but that he saw the defendants at that place. He testified that he saw the defendants there about half an hour before he heard the shots, something like that. This man Luis Gonzales testified on both trials that he was within comparatively a short distance from the bridge, when the shots were fired, and heard them.

"Q. Was there any other witness on that case that gave direct, positive evidence, so as to prove their presence, and identify them with the shots? A. I think Rivera gave better testimony than he did, as to identifying the parties. There were other people that testified as to the shots, fully as well as Luis Gonzales. There was no witness that testified as to both facts.

"Q. Luis Gonzales testified as to both facts, didn't he? A. Yes.

"Q. And he put the defendants closer, in point of time, to the shots and to the place where the shots were fired, than any other witness? A. I don't know that I understand you. He put himself closer, in point of time of firing the shots, than Francisco Rivera did, but there was some other witnesses that saw the shots fired,

and were fully as close as he was. I think a man named Hogle was one.

"Q. This witness didn't see the defendants? A. No, he didn't pretend to.

"Q. The testimony of Luis Gonzales was that they (Luis and his brother Mauricio) saw the defendants, and passed on some five or six hundred feet, and saw the shots? A. Something of that kind.

"Q. And that he spoke to one of the defendants, Hipolito Vigil, the one that was killed, one of the accused, at the end of the bridge, as he came across? A. He said he spoke to Hipolito at a little acequia.

"Q. Close to the place? A. A short distance from them.

"Q. The evidence on the part of the territory tended to show that the shots were actually fired by the two Borregos and Hipolito Vigil? A. There was some testimony to that effect. There was no evidence that I remember, on the part of the territory, that limited it in that way. The evidence, so far as I remember, tended to show that the parties who were standing near the end of the bridge, the two Borregos, Hipolito Vigil, Chino Alarid, and Patricio Valencia. It was in evidence that Chino Alarid had gone down town at the time the shots were fired. The evidence of these men that pretended they saw him there was some evidence that he had gone down town. The testimony as to his presence there was that he had seen him there about half an hour before,—the testimony of Luis Gonzales that he had seen him there. My recollection is that he said,—the testimony was, I think, he said,—he saw about five of them there. I don't pretend to remember all that testimony minutely. That is all.

"Q. Is it not a fact that Patricio Valencia wanted to get a severance,—to have a separate trial? A. Yes, his father stated he did.

"Q. Didn't you oppose that? Hadn't he already employed Ben Read to defend him? A. I don't know.

"Q. Didn't you object to Mr. Read's being associated with you in the trial? A. Mr. Read suggested that some of these defendants wanted to employ him, but I suggested that if they had any money they had better give it to me.

"Q. Did you defend the defendants without compensation? A. Yes, I have a promise of compensation; but I defended them without any."

It will be seen from this that the influence of this woman, the mother of three important witnesses, who either had given or was known to be in possession of material and damaging testimony against the accused, was a matter of vital and important consideration to the defendants and their counsel; and it may be construed as strong corroborative circumstances to strengthen the testimony of the woman Rosalia Gonzales y Baca.

The court hearing this case sat as a jury, saw the witnesses, heard them testify, and observed their manner and conduct while upon the stand, and, as a jury, passed upon and considered all the facts and circumstances as they developed before the court. And in recording this dissenting opinion, as the dissent must largely rest upon the facts, I have endeavored faithfully to extract and incorporate into this opinion only such parts of the testimony as will give a fair and impartial understanding of the case, and of all the surrounding facts and circumstances influencing it, in so far as it is thought proper, without becoming too unreasonably prolix, and to show, in so far as possible, in a calm and dispassionate manner, reasons for refusing to concur with the majority of the court. It is admitted in the majority opinion of the court "that if we are to credit the whole of the testimony of the witness Nowell, then this part of the charge is established, as Nowell states that the respondent, Catron, came to the penitentiary and had a talk with him, in which the

respondent, Catron, told him, the witness, in substance, that he, Catron, did not want him, the witness, to testify as he had done before. * * *" It is true that the respondent testified that he went there for the purpose of ascertaining from the witness which of the statements were true,—the one his partner, Spiess, told him the witness had made, or the one he swore to on the preliminary examination; but does his own statements sustain this position, or his purpose? I think not. Nowell swears that respondent told him, "Answer the questions as I told you, and decline to answer the others," and, "Now if you go on and testify in this case, you will be indicted for perjury, because these Borregos are liable to come clear, and then they will get you for perjury;" and again he testified that respondent "told me if I answered these questions different from what I did before they would get me for perjury. He says, 'You do as I tell you, and you will not be indicted for perjury.' " Neither of these statements are in terms denied by the respondent. He bases his denial entirely on the ground that the testimony previously given was false, "as he understood it,"—and this, too, after the witness says he told respondent that he had told the truth. Respondent offered to defend witness if he got into trouble, and this is not denied, and the whole burden of the examination of respondent's counsel was to the effect that witness should on the approaching trial testify to the truth as he (respondent) " understood it." The only real and substantial and pointed contradiction is that witness says he told respondent that he had testified to nothing but the truth, while respondent swears that witness told him just the contrary. There are many other facts and circumstances corroborating Nowell, which will hereafter be discussed.

The testimony shows that the witness Porfilia Martinez de Strong, or what she would swear to, was first

brought to the attention of respondent by Charles M. Conklin, who was, at the time of the killing, and for some time thereafter, the sheriff of the county, and that he caused the witness to be brought to Santa Fe for the preliminary hearing, and took her to his private house, and there kept her, and, she swears, told her what she must swear to at that examination. Then she was brought again to Santa Fe, in the nighttime, under arrest, as she states, by one Thayer, taken directly to a private office of respondent, kept there the remainder of the night, all the next day, except while being examined in chief, and until nighttime, and her meals brought to her by said Thayer, when she was put into a carriage and sent to the train, and sent back to her home at Lamy,—and all at the cost and expense of respondent; that a day or two thereafter she voluntarily returned, sought the district attorney, and requested to be recalled that she might retract her testimony given at the preliminary hearing and at the trial; that, pending these charges, respondent prepared a long affidavit contradicting all she had said on her cross-examination, employed the son of a close personal and political friend of his, gave him the necessary funds, and directed him to go to her house at Lamy and secure her signature to it; that this witness is very ignorant, understands little or no English, can neither read nor write her own language, a widow, the mother of children, very poor, friendless, and possessed of a bad moral reputation. With reference to the testimony of Rosalia Gonzales y Baca, it is corroborated only to this extent; that it is shown that her three sons were all very important witnesses for the prosecution; and while her testimony alone could not stand as against that of the respondent, yet it is shown that respondent did procure the affidavit of her son Mauricio, and that, too, to the exact purpose and effect that his mother swears that she was asked to do; and

in one of the charges against the respondent Spiess, tried as a part of this case, the said Luis testified positively that respondent Spiess had him called to the office, and wrote out a bank check for $10, and offered it to him if he would make an affidavit similar to that made by Mauricio, and that the whole transaction was in the presence of Gus O'Brien. Mr. Spiess positively contradicts this by his testimony, but he failed to put O'Brien on the stand to corroborate his testimony and contradict that of Luis, which would have been an easy matter, and a very strong and proper thing to have done.

In order to understand more clearly the important facts these witnesses testified to on the preliminary hearing, I will state them briefly. Nowell testified that he saw the two Borregos about six hundred feet from, and going in the direction of, the place of the killing, about three quarters of an hour before the killing occurred, and that he again saw them going in a direction from the place, about a quarter of a mile distant from the place, about half an hour after the killing, and that he saw and recognized them. Max Knodt testified that he saw and recognized the said Francisco, with two others, filling completely the description of said Antonio and said Alarid, about three hundred yards from, and going in the direction of, the place, about three quarters of an hour before the killing occurred. Luis Gonzales testified that he and his brother, Mauricio Gonzales, crossed the said bridge a few minutes before the killing occurred, and just beyond it, a few steps, saw, recognized and spoke to said Hipolito Vigil, and saw with him another man, and that he and his brother passed on about two hundred yards further south, stopped, and heard the fatal shots fired, and saw the flash from the guns. The witness Porfilia Martinez de Strong testified that Luis Gonzales lived, at that time, in the same house with

her and her husband, who was then alive, and that, at the very time of the killing, the said Luis was in bed in an adjoining room to her, and that a man came and rapped on the door, and that she saw said Luis get up and answer the call, in his night clothes, and heard the man on the outside tell him that "Chavez had been killed on the bridge." The testimony of the witnesses Nowell, Knodt and Luis and Mauricio Gonzales completely destroyed the alibi, as set up by the defendants; and if this evidence was untrue, or if the jury had disbelieved them, and believed the testimony offered to impeach their moral characters and their standing for truth and veracity, then the alibi would have been sustained, and the defendants acquitted, because these were the only witnesses who testified that they saw the defendants within the locality of the place of the killing at any time within three hours of the time it took place, except Francisco Rivera. But his testimony, standing alone, would hardly have warranted a verdict of guilty, because it was shown that he was, to some extent, an accessory before the fact to the conspiracy to commit the crime. It is but natural, then, that the defendants and their counsel would be very much interested in these witnesses and their testimony; and it clearly shows the motives for obtaining affidavits from all of them that it was possible, and for the efforts used to break down and destroy the others by impeachment and otherwise.

But it is contended by counsel for the respondent that all these witnesses are of bad moral character, and that their standing for truth and veracity is bad, and that they are unworthy of belief; and the majority of the court has sustained that view of the case. To sustain this contention, respondent offered a number of witnesses, who testified that Nowell was a man of bad moral character, because he had been indicted and convicted of adultery, and that his standing for truth

and veracity was bad, and that they would not believe him on oath. Almost to a man, these witnesses were strong partisans, and favor seekers of the respondent, and were unable to show that Nowell had ever been charged with a violation of the law, though a resident of this county for a number of years, except in the adultery "incident," and that because he was a hack driver, and sometimes drank too much whisky; and the only reason they could give why he was unworthy of belief was because they would not believe him. The prosecution offered about the same number of equally respectable witnesses, who testified that they had known him for a number of years, and never heard of him violating the law, except in the adultery "incident," that his standing for truth and veracity was good, and that they would believe him on oath. Respondent offered a number of witnesses who testified that the woman, Porfilia Martinez de Strong, and the old woman, Rosalia Gonzales y Baca, were women of bad moral character, unworthy of belief, and that they would not believe them under oath, and that the old woman, Rosalia Gonzales y Baca, was generally a very bad woman, and a "procuress," whatever that term may imply. Respondent also offered witnesses who testified that Luis Gonzales and his brother Mauricio were of bad moral character, and that their standing in the community for truth and veracity was bad, and that the witnesses would not believe them on oath. If these witnesses were all ex-convicts, petty thieves, liars, prostitutes, and "procuresses," and unworthy of belief, why was respondent so solicitous about their testimony? Why did he go to the penitentiary, and seek the private interview with the convict, and say to him: "Now, if you go and testify in this case, you will be indicted for perjury, because these Borregos are liable to come clear, and then they will get you for perjury. * * * I will defend you. I will protect you." Why

did he advise Otero by wire that the service of subpoena in Colorado was void? Why did his confidential agents and friends make a trip to Colorado for the purpose of suppressing Nowell's testimony, by attempting to spirit him out of the jurisdiction of the court? Why did he secure the affidavit of Mauricio Gonzales, for the purpose of destroying his testimony on the trial? Why did he have his agent bring one of these prostitutes to his private office in the nighttime, furnish her bed and meals, and keep her there in his private office twenty-four hours, all with his knowledge and consent, and where, she swears, Thayer kept her locked in and guarded her all the time, and all at his expense? Why did he make such efforts to secure her affidavit, through Ramon Garcia, and that, too, pending this investigation? If these people were so unworthy of belief, as his witnesses swore they were, what had he to fear from such characters? What use had he for their testimony, if he regarded them as so untruthful? One of the strongest tests of innocence is open, frank and fearless conduct of an accused, and his willingness to meet any and all of his accusers face to face. It is true the respondent urged a speedy hearing of this case, and, when the time was fixed for the hearing, he loaned a new-made friend $50 as "a business accommodation," who immediately proceeded to Colorado, sought an interview with the ex-convict, persuaded him not to obey the process of the court, urged him to go to Texas, and told him he would "get the worst of it" if he came,—that they had "all the other witnesses fixed." The moral characters of these witnesses may be, and no doubt are, not what they should be, and they may be unworthy of belief. But, are the facts they testified to unworthy of belief in this case? Judge Seeds believed them on the preliminary examination, and held defendants without bail. A jury believed these witnesses when they made a statement of the

same facts, and that, too, as against the testimony of this respondent, respondent Spiess, and a number of other highly respectable citizens, who swore that they would not believe them under oath. A judge sustained the jury in the finding of the verdict, and pronounced sentence of death on the defendants. And, from all the evidence taken together, with all the surrounding circumstances in this case, I believe they told substantially the truth. A witness may be guilty of all the most heinous crimes known, and he may be indicted, go into court, confess his crime, with the promise of immunity from punishment, and become a witness against his co-criminals; and on his testimony, corroborated by circumstantial evidence only, a verdict of conviction be sustained. Any witness may testify to the truth in any particular case, but all witnesses do not testify to the truth in all cases. Then, the question is, did these witnesses testify to the truth, substantially in this particular case?

I understand the rule to be that, where a witness knowingly and willfully testifies falsely to material facts, his testimony may be disregarded in toto, unless corroborated by other legal evidence, and that this rule applies whether the witness has a good moral character, and stands well for truth and veracity, or not. I believe that a court, sitting as a jury, is guided and controlled, in considering and passing on the facts brought out by the evidence, by the same rules of law which a court gives for the guidance of the jury in a similar case, when similar facts are shown before the jury; and I think that that rule is general, and should have been applied in this case, in the same manner that it was applied to the same witnesses to like facts in the Borrego case and other similar cases, and in accordance with the practice prevailing in this jurisdiction. Respectable people do not become witnesses to assassinations by lying in wait; nor do the assassins,

as a rule, associate thereafter with respectable people, but they usually associate and converse with just the class of people that these witnesses do, and they find out, expose, and bring to light these crimes, and on their evidence guilty parties are convicted, as in the Borrego case. People whose moral character and standing for truth and veracity are unimpeachable do not, as a rule, frequent the haunts of the prostitute, "procuress" and petty thief, the very homes and comforters of crime; and if criminals shall go unwhipped of justice until reputable citizens can be found by whose testimony they may be convicted, then the law of the vigilante must be invoked, and the laws established by the wisdom and experience of the past for the protection of life, liberty and the pursuit of happiness must be abandoned.

It is not contended that all of these witnesses possessed good moral characters, nor is it contended that the standing in the community of all of them for truth and veracity is unimpeachable. Were such the facts, in all probability they would never have been witnesses in the Borrego case, and therefore not in this case. Let us see who they are, and what are their vocations in life, as shown by this record. Nowell is a very poor man, with very little education, and what is known in this country as a "frontiersman," all his life, and a hackman by occupation; but there is not a word or intimation in the record here, or in the Borrego case, that he is a dishonest man, or that he has ever been guilty of a dishonorable or dishonest act in his life, except in reference to the adultery case. Knodt is a poor man and a foreigner, with little education, speaks very little English, very poor Spanish, and very bad German (as shown by the difficulty the interpreter had in rendering his German into English), and a butcher by trade. Porfilia Martinez de Strong is very poor, a widow, the mother of several children, unable to read

or write even in her own language, and speaks very little English, of a questionable reputation, an outcast on the world, and absolutely friendless. Rosalia Gonzales y Baca is a very old, ignorant woman, in the extreme straits of poverty and distress, and denominated by some of the impeaching witnesses a "procuress." Luis and Mauricio Gonzales are both ignorant, possessed of a certain degree of cunning, but of idle and dissolute characters, without any designated occupation. Every person at all acquainted with the history of crime knows that this is just the class of people who become cognizant of the commission of crime, and expose and furnish testimony for its detection and punishment. Upon such people's testimony, the better and law-abiding classes, the courts, juries, and the administrators of the law, must rely for the enforcement of the laws, and the suppression of crime. Without the testimony of this class of people, the law would fail of vindication, and the majority of criminals would go unpunished. And it is equally as well known, too, that this class of people are sought out as proper subjects for subornation of perjury. It is unreasonable to suppose that reputable people who happen to be witnesses are approachable by the opposing side of a case; and the presumption indulged in by the court in this case, that because good citizens testify that witnesses are unworthy of belief generally, that therefore their testimony is false, is erroneous, unless it is shown by circumstantial evidence, or by disinterested witnesses, that the facts testified to by them were improbable. But such is not the fact here.

It is shown that the interviews between respondent and the witnesses Rosalia Gonzales y Baca, Mauricio Gonzales, Porfilia Martinez de Strong, and Ramon Garcia were all had in the presence of other people; but they were not introduced to support and corroborate respondent, and no reason was shown why they

were not. It is also admitted, in the opinion of the court, that "testimony has been offered which, if accepted as credible, tends to the establishment of these charges," and the dismissal is based alone on the denial by the respondent, and because other witnesses testified that they would not believe the witnesses who gave the "testimony tending to the establishment of the charges." But it is not contended that any evidence was offered, except that of the respondent, which in any manner tended to contradict any facts testified to by these witnesses in this case. There are, however, pointed contradictions to many important facts, as between the prosecuting witnesses and the respondent. The motive to suppress and destroy the testimony of these witnesses, in the Borrego case and in this case, is clearly shown; and the interest of the respondent in the result of this case was great, and important to him, while it does not appear that they had any interest whatever in the result of this case; and, according to the elementary rules of the law of evidence, every legal intendment and presumption is in favor of the truthfulness of the testimony of these witnesses. The jury are required to pass on the truth or falsity of the facts testified to before them, and not on the personal of the witnesses. The matters of moral character, and the standing for truth and veracity of the witnesses, are only incidental matters for the jury to consider. These five or six witnesses testified, each, to separate and disconnected facts, which, it is alleged, occurred at different and distinct times and places. No motive, reason, or conspiracy is either alleged or shown, as an inducement why they should have so testified, either at the preliminary hearing, or on the final trial, or at this investigation. They each separately testified to substantially the same state of facts on each particular occasion, covering a period of some eighteen months. It is not contended that one single cause usually

assigned as a reason for the giving of false testimony by witnesses was shown or existed in this case; and it was perfectly apparent to the court, from observation of these witnesses, their conduct upon the stand, and their manner while testifying, that they are wholly incompetent, from want of education, natural ability, and experience, to fabricate the facts so testified to by them. Nor is it shown or contended that any malice or illwill, on the part of any of them, existed towards the respondent; but, on the contrary, it is shown that at least one of them, who testified to very damaging facts, was a very warm personal and political friend of respondent. Nor is it contended or shown that any illegal or improper influences were brought to bear on any of them by the prosecution, or by any one else, as a reason for their so testifying; while, on the contrary, it is shown that many efforts were made, by and on behalf of respondent and his friends, to intimidate and suppress the testimony of at least some of them, and their testimony stands uncontradicted by that of any disinterested witnesses. Therefore, the presumption is that these witnesses testified, in substance, to the truth, and to presume that they testified falsely, under such circumstances, it seems to me, is a clear disregard of the most elementary rules of evidence, established by reason and experience for the guidance of courts and juries in the administration of justice from time immemorial, and is contrary to the deduction of the truth by the process of ascertaining one fact from the existence of another. That is, in this case respondent did obtain one affidavit, and did attempt to obtain another, for the purpose of suppressing or destroying the testimony of these witnesses, and did render valuable assistance to the witness Knodt, and did interview other witnesses; and the jury would be presumed to reason that, it being shown, beyond a reasonable doubt, that respondent did attempt to suppress or destroy the tes-

timony of two or three of the witnesses, and did interview the others, therefore the testimony of such witnesses is true, unless controverted by other disinterested testimony, and nothing of that nature appears in this record. To hold that such testimony, under such circumstances, is unworthy of belief, simply because the moral characters and standing for truth and veracity of some of the witnesses are impeachable, is to destroy the most fruitful source of testimony for the detection and suppression of crime, and to break away the barriers, and open wide the gates to the criminal classes, and to subject the lives, liberties, and property of the weak and law-abiding to the will of the strong and vicious.

It is held, in the opinion of the court, "that these charges are five in number. Each stands for itself, a separate and distinct charge, as a separate and distinct act, alleged to have been done at separate and distinct times, with separate and distinct individuals." The charge is, in substance, that respondent was guilty of unprofessional conduct as a lawyer in the defense of the Borrego case; and it is one, and only one, charge, with five separate and distinct specifications. These specifications set out in detail the manner in which the unprofessional conduct is alleged to have occurred, and the testimony offered should be directed and applied to the gist of the charge, which is unprofessional conduct during the progress of the Borrego trial; and testimony offered in support of any one or more of the specifications goes to support the charge, and not to establish a separate and distinct offense, as stated in each separate specification. It can hardly be presumed that the committee would have attempted to establish so serious a charge on the testimony of any one witness to any one of the specifications; nor should it be presumed that this court would have spent its time hearing a charge against a lawyer based simply on the testimony of any

one of these witnesses. Such a course would subject both the committee and the court to the criticism of frivolity. The same rule that applies in other cases should apply in this, and that is, that all the evidence, both direct and circumstantial, must be taken and considered together. It is an elementary principle that a trial court must instruct the jury to take and consider together all the evidence before them, and render a verdict accordingly. The rule attempted to be established by the court is unfair to the respondent, because it might be held that the proof was sufficient to establish the allegations in one of the specifications, yet if the allegations in the remaining four specifications were satisfactorily explained away, the court would hardly be warranted in entering an order of disbarment, on the principle, "De minimis non curat lex." The principle that the testimony of any one of the witnesses might have been insufficient to sustain the charge, but when all the testimony of all the witnesses, with all the circumstantial evidence offered, is taken together, is sufficient, is well illustrated by the old fable that a bundle of sticks is stronger than any single stick, and this was the principle pursued by respondent; that is, that while his testimony alone was not strong enough to overcome the combined strength of all the testimony for the prosecution, he therefore offered other witnesses to destroy and break the strength of the prosecution's evidence.

The opinion also states: "Prominent citizens of this community, officials in high standing, prominent members of the bar, reputable business men, in large numbers, have come upon the stand, and have testified, without qualifications, that they would not believe these witnesses under oath, in consequence of their character, their reputation, and their standing in this community." If I believed this statement from the evidence in this case, and if I had the power, I would

grant those four defendants a new trial, just as soon as I could sign my name to the order. I believe the law protects, with its mantle of mercy, alike, the rich and the poor, the high and the low; and those four men now awaiting in solemn solitude, under the pall of the death sentence, pronounced by the same learned and honored judge who uttered the above strong and cutting sentences, are just as much entitled to their lives as the respondent is to practice law at this bar. Their lives and their liberties are just as sweet, dear, and valuable to them and their loved ones, as the honor, profits, and emoluments are to the respondent as a lawyer. If this testimony against them in that case was found sufficient, to the exclusion of all reasonable doubt, to convince a jury of twelve good and lawful citizens of the guilt of the accused, and the judge concurred in that view, why is it not sufficient to sustain these charges? Without their testimony, the verdict certainly would not stand.

It was contended by respondent, as an excuse for sending out for his witnesses, friends of the defendants, that he could not trust the officers of the court to subpoena them in the regular way, and it seems to be the view of the court also; but there is not a word (except in the testimony of the respondent) in the record to show that the officers were not as faithful in their duties to defendants as to the prosecution. The committee offered in open court to connect respondent with the authorship of an article in a newspaper containing severe strictures on this court with regard to the conduct of this case; but respondent's counsel vehemently opposed its introduction, and the court ruled it out. Why was this done, if respondent was innocent, and courted a fair, full, and honest investigation? The respondent stands before the court, not as an ordinary person. He is learned in the law, and is far in advance of the ordinary lawyer in the practice of the profession; and in such matters he well knows that "his conduct is

attributable to his supposed knowledge that the truth would militate against him." The suppression or fabrication of evidence always raises a presumption against the accused, in matters of fact before a jury, and the maxim, "Omnia praesumuntur contra spoliatorem," applies here with great force. 1 Greenl. Ev. 37.

The opinion of the court states that "the uncontradicted record shows Nowell to have been a penitentiary convict, indicted, tried, and convicted of a felony, and sentenced to imprisonment. He abandoned his family, disavowed his marriage." * * * That he was tried, convicted, and sent to prison is not denied; but that he was tried and convicted of a felony is denied. He was convicted of the crime of adultery, under what is known as the "Edmunds-Tucker Act" of congress. But that is not a felony under the law, because that act does not declare the crime of adultery a felony; and it is not a felony at common law, because it is by the act of congress a purely statutory offense, and not even bigamy or incest are by that act declared felonies. Supp. Rev. Stat. U. S., p. 568; U. S. v. Vigil, 34 Pac. Rep. (N. M.) 530; Rev. Stat. U. S., sec. 819; U. S. v. Coppersmith, 4 Fed. Rep. 198; U. S. v. Yates, 6 Fed. Rep. 861; U. S. v. Daubner, 17 Fed. Rep. 793; U. S. v. Bayle, 1 Fed. Rep. 784. And many other authorities might be cited. And there is not a line or a word in this record, in the record of the Borrego case, or in the adultery case, to sustain the statement that Nowell "disavowed his marriage;" and the only hint at such a thing was suggested by respondent's counsel, on mere idle rumor, that Nowell had told the respondent Spiess that he had never been married. That was all there was of it, and nothing else whatever even tended to show that Nowell had ever at any time "disavowed his marriage."

There were some questions which arose during the progress of the trial which I deem of sufficient impor-

tance, in the due administration of justice to notice here, and from which I dissented from the views of the majority of the court at the time; but, owing to the necessity for a speedy hearing, the members of the court could not then express their views in writing. I was of the opinion then, and am still of the opinion, that all evidence offered tending to show complicity of respondent in any way to intimidate or influence witnesses on the hearing, or in the publication of a newspaper article or articles reflecting upon the court, or any member of it, in connection with this hearing then pending before it, should have been admitted. The committee charged with the prosecution stated that they expected to connect the respondent with these acts. The evidence was admissible upon the plainest and most fundamental principles of evidence; that is, that all acts done for the fabrication or suppression of evidence, for the intimidation of witnesses, jurors, or courts, are acts evincing a consciousness of guilt, and therefore admissible. Innocence trusts to truth, and relies on legal methods to have the truth shown, and the judgment of the court rendered according to the demands of justice. Nothing was shown which should have changed the rule on this hearing. All the facts should have been permitted to see the light of day. The rules of evidence are not intended for the suppression of facts, if these facts tend to aid in the determination of the issues involved; and so should they have been applied. It is not necessary to cite authorities to establish the principle for the admissibility of this evidence. I know of nothing whatever which would justify its exclusion.

I do not believe that an attorney is authorized to visit and talk to witnesses who are expected to testify on the opposite side of the case, and learn from them what they know, and are expected to swear to in that case; and I am sure they should not do so under any circumstances, after the witness has once testified in the

case. This principle is strongly illustrated, in the Borrego trial, in the case of the witness Max Knodt, whose testimony on the preliminary hearing was very damaging to the clients of respondent; but, as soon as he received the pass, through the influence of the respondent, his memory failed him, and his testimony became valueless to the prosecution, and, in so far as the testimony of that witness was pertinent, the due administration of justice was defeated. I know of no code of moral or legal ethics which would warrant any attorney in such conduct, and I think the attorney who permits himself to do so, steps clear beyond the bounds of his duties and responsibilities in the legal profession, and becomes guilty of a "moral delinquency," at least, and subjects himself to disbarment. The legal profession needs no code of rules for its guidance. It is composed of too many honorable and illustrious men to require any such restraints. The profession is composed of lawmakers, as well as administrators of the law; and the only rule that I know of for their guidance in their profession is a clear and distinct knowledge of the scope of their professional duties, and a conscientious belief in the right, frankness and honesty of their acts. The late Mr. Associate Justice MILLER, in language as clear and pure as the sunbeams, has said: "The lawyer in this country is one of the administrators of justice. The judge who presides in the court is another, with more authority of position, and perhaps in some respects a more burdensome one. But the court, and the clerk, and the marshal, the sheriff, the jury, the lawyer, all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right, and it should be understood that they are subjected to the same responsibilities. They have a duty, undoubtedly,

to their clients; but that is not the first duty, as is generally supposed. Their first duty is the administration of justice, and their duty to their clients is subordinate to that." In re Thomas, 36 Fed. Rep. 242. . The methods resorted to in securing the affidavit of the witness Mauricio Gonzales, and in attempting to secure that of the witness Porfilia Martinez de Strong, are not such as to command favorable consideration from the court. In speaking of the preparation of affidavits for clients and witnesses to sign by an attorney, Judge SHARSWOOD, in his work on Legal Ethics (page 111) says: "The client will be often required, in the course of a cause, to make affidavits of various kinds. There is no part of his business with his client in which a lawyer should be more cautious, or even punctilious, than this. He should be careful lest he incur the moral guilt of subornation of perjury, if not the legal offense. An attorney may have communications with his client in such a way, in instructing him as to what the law requires him to state under oath or affirmation, in order to accomplish any particular object in view, as to offer an almost irresistible temptation and persuasion to stretch the conscience of the affiant up to the required point. Instead of drawing affidavits, and permitting them to be sworn to, as a matter of course, as it is to be feared is too often the case, counsel should on all occasions take care to treat an oath with great solemnity, as a transaction to be very scrupulously watched, because involving great moral peril, as well as liability to public disgrace and infamy. It lies especially in the way of the profession to give a high tone to public sentiment upon this all-important subject, the sacredness of an oath. It is always the wisest and best course, to have an interview with the client, and draw from him, by questions, whether he knows the facts which you know he is required to state, so that you may judge whether, as a conscientious man, he ought to make

such affidavit." The assistance rendered Otero, in his efforts to spirit away the witness Nowell for the purpose of suppressing his testimony on this hearing, and the favors granted the witness Knodt, and his consequent obligations to the respondent, followed by his loss of memory at the Borrego trial, do not shine with any degree of credit on the side of the respondent, and do not comport with the duties and responsibilities of the profession; and an attorney who permits himself to engage in such practices lays himself open to the charge of "tampering" with witnesses, and shows either an utter forgetfulness of the high responsibilities of his position, or a gross disregard for an honest administration of justice. If such acts are to be passed over unnoticed by the courts, then the profession will be reduced, from that high and honorable place to which it belongs, to the level of the trickster and charlatan; and while the lawyer who engages in such practices may become distinguished among a class of people who indulge in such methods in the conduct of their own affairs, yet he can never expect to achieve the fame of a Marshall or a Webster, but he will sooner or later find himself at the very bottom of the ladder.

After a careful observation of the witnesses, the manner of their testifying while upon the stand, their interest or noninterest in the results, and a conscientious consideration of all the testimony evolved on the hearing, I am irresistibly driven to the conclusion, however unpleasant it may be, that the legal evidence contained in the record sufficiently sustains the charge of unprofessional conduct on the part of the respondent during the progress of the trial of the said Borrego case, and I so find. The charge against respondent Spiess consists of four specifications; and, as the greater part of the facts are set out in the opinion of the court, it is sufficient for me to say that I can not concur in the conclusions therein reached for the reasons hereinbefore stated.

[No. 612. December 20, 1895.]

UNION TRUST COMPANY OF NEW YORK, APPELLEE, v. ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY; POSTAL TELEGRAPH CABLE COMPANY, INTERVENER, APPELLANT.

1. INTERVENTION—SECS. 1890–1892, COMP. LAWS, 1884—EQUITY.—Sections 1890–1892, Compiled Laws, 1884, relate to actions at law, and not to equitable proceedings. In such proceedings parties claiming an interest in the subject-matter may come in by intervening petition and litigate their rights, if any they have; and it is within the inherent power of courts of chancery to permit them to do so.

2. RIGHT OF ACTION OF FOREIGN CORPORATION, NOT ADMITTED TO DO BUSINESS IN TERRITORY—COLLATERAL ATTACK.—An objection that a foreign corporation has failed to file a copy of its charter and of the laws of the state or territory granting the same, and to designate an agent on whom process may be served, as required by statute, before it is authorized to do business in this territory, can not be raised in a collateral preceeding by intervention, but only in a direct proceeding by quo warranto for that purpose.

3. TELEGRAPH COMPANY—RIGHT OF WAY ALONG LINE OF RAILROAD—EXCLUSIVE PRIVILEGE—CONTRACT AGAINST PUBLIC POLICY.—By section 5263, Revised Statutes of the United States, a railroad company is prohibited from entering into any contract granting an exclusive privilege over and along its right of way and through the public domain to any single telegraph company, where such railroad has acquired its right of way under and by virtue of an act of congress; and this act extends to all military and post roads, whether on the public domain, or on private property acquired by a railroad company by purchase or by condemnation proceedings; and a contract by a railroad company granting such privilege is against public policy, and void. Trust Co. v. R. R., 63 Fed. Rep. 513; Tel. Co. v. Tel. Co., 96 U. S. 1.

APPEAL, from an order sustaining a demurrer to the intervening petition filed, from the First Judicial District Court. Reversed (with directions).

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for appellant.

This is not a statutory intervention, but an intervention or petition for what is designated in equity an examination pro interesse suo, and the appropriate way to present the alleged rights of the petitioner in property, or to the use of the same, which is in the hands of receivers. Vault Co. v. McMetta, 153 U. S. 554; Kippendorf v. Hyde, 110 Id. 276; Jay v. St. Louis, 138 Id. 1; High on Rec., secs. 254, 255; Kennedy v. R'y, 3 Fed. Rep. 97; 2 Danl. Chy. Prac. 1057. See, also, Trust Co. v. R. R., 63 Fed. Rep. 517.

The petitioner having complied with section 5263, Revised Statutes, United States, has a right to place and maintain its line on the right of way and along the line of any postal road of the United States. The A., T. & S. F. R. R., and its leased lines in New Mexico, are postal roads. Sec. 5263, 5264, Rev. Stat. U. S., act July 14, 1866, 14 Sts. at Large, 221; Trust Co. v. R. R., 63 Fed. Rep. 610. See, also, Tel. Co. v. Texas, 105 U. S. 460; Tel. Co. v. Tel. Co., 96 U. S. 1.

The right granted by the statute is not restricted to such military or post roads as are on the public domain. Tel. Co. v. Tel. Co., supra; Act June 8, 1872, Rev. Stat. U. S., secs. 3964, 3965.

Both the attempt to grant exclusive privileges as to occupancy of the right of way, and the enjoyment of special facilities for construction and maintenance, and the denial of such privileges to all other telegraph lines are against public policy and void. Trust Co. v. R. R., supra, and citations. See, also, Gibbs v. Gas Co., 130 U. S. 396; Steam Nav. Co. v. Windsor, 20 Wall. 64.

The A., T. & S. F. R. R., having become the lessee, is charged with the performance of the public duties of the lessor, and could not make a contract with reference to the franchises of the lessor which the lessor itself could not make. U. S. v. R. R., 50 Fed. Rep.

28; Penn. Co. v. R. R., 118 U. S. 306; Thomas v. R. R., 101 Id. 28.

CATRON & SPIESS for appellee.

If appellant has any rights whatever which it may be authorized to insist upon by way of intervention, sections 1890, 1891, 1892, Compiled Laws, 1884, give it the only relief it can get in that way.

There are only two methods by which a telegraph company can obtain the right to enter upon and construct its line along the right of way of a railroad company; one is by the consent of the railroad company; and failing in that, by condemnation proceedings according to law. Tel. Co. v. R. R., 14 S. E. Rep. 803; A., T. & T. Co. v. Smith, 18 Atl. Rep. 910; St. Louis v. Tel. Co., 148 U. S. 92; Tel. Co. v. R. R., 6 Biss. 158; Tel. Co. v. Tel. Co., 7 Id. 367; Tel. Co. v. Tel. Co., 9 Id. 72; Tel. Co. v. R. R., 4 Fed. Rep. 284; 11 Id. 1.

The petition of appellant does not state facts to show sufficient interest in the subject of the litigation to entitle it to be filed. Cutting v. R'y, 45 Fed. Rep. 444; College v. Iowa Co., 32 Iowa, 520; Comp. Laws 1884, secs. 1890–1892, copied from Iowa statutes; Smith v. Gale, 144 U. S. 509.

If appellant could bring suit in any manner, it should have obtained leave to sue the receivers by original bill or by procedure under the statute, or other adequate remedy prescribed by law, but it could not proceed against the refusal of the court. Receivers v. Bank, 34 N. J. Eq. 450; Coburn v. Cedar Valley L. Co., 138 U. S. 196; Brassy v. R'y.

The power of the court extends only to sale of property upon final decree, and its preservation and economical management pending final decree. It can not embarrass or detract from the value of the property by authorizing an additional incumbrance. A., T. &

T. Co. v. Smith, supra; Beach on Rec., sec. 249; Goddard on Eas., 1; Van Wagner v. Van Nostrand, 19 Iowa, 422; Barlow v. McKinley, 24 Id. 70; Gerald v. Elley, 45 Id. 322; McGowan v. Myers, 60 Id. 257.

Appellant insists that this appeal should be dismissed, because the entire subject-matter of the controversy appealed from involves solely a matter of discretion, and is not subject to review. "A matter which rested in the sound discretion of the court can not be assigned for error." Pow. Ap. Pro., sec. 118; Meelish v. Richardson, 23 E. C. L. 276; Ins. Co. v. Hodgson, 6 Cranch, 206; Sims v. Hunbley, 6 How. 5; Spencer v. Lapsley, 20 Id. 267; Sparrow v. Strong, 3 Wall. 105; Embry v. Palmer, 107 U. S. 17.

A contract, even under more stringent provisions than in this case, is not illegal. R'y Co. v. A., T. & S. F. R., 110 U. S. 667; Express Cases, 117 U. S. 1; Dubuque v. Richmond, 19 Wall. 584; Pullman v. R'y, 115 U. S. 587; Wiggins Ferry Co. v. R'y, 73 Mo. 388.

See, also, as bearing upon the foregoing points, U. S. v. R'y, 56 Am. and Eng. R'y Cas. 51; Richmond v. R. R., 26 Iowa, 191; R. R. v. Express Co., 35 N. J. Law, 240; Palmer v. Stebbins, 3 Pick. 188; Rochester v. Hayden, 50 N. Y. 525; Tel. Co. v. Atty. Gen., 125 U. S. 640; Smith v. McCulloch, 104 U. S. 126; Leloupe v. Mohle, 127 Id. 640; Leeds v. Richmond, 102 Ind. 372; Allen v. Jones, 47 Id. 439; 56 Mich. 244; Chamberlain v. E. Port S. C. Co., 41 N. E. Rep. 43; W. R. B. Co. v. Dicks, 6 How. 507.

H. L. WALDO for receivers.

LAUGHLIN, J.—This is an action on an intervening petition in the above cause, brought by the Postal Telegraph Cable Company, for an order on the receivers of the Atchison, Topeka & Santa Fe Railroad Company, requiring them to grant to the intervening petitioner leave to construct a line of telegraph poles,

wires, etc., over and along the right of way of said railroad company, and to attach the same to the bridges along said right of way, and for aid and assistance in transporting and distributing its men, materials, supplies, etc., along the same, from the southern boundary line of the state of Colorado, through New Mexico, to the city of Albuquerque, and for such other rights, privileges, and facilities as may be necessary and convenient in the construction, operation, and maintenance of such line of telegraph by the Postal Telegraph Cable Company, and as set out and prayed for in said intervening petition. During January, 1894, the Union Trust Company of the state of New York filed its bill in chancery, in the district court in and for the county of Santa Fe, against the Atchison, Topeka & Santa Fe Railroad Company (which, for brevity, will hereafter be styled the "Santa Fe Company"), for a foreclosure of a mortgage, and for the appointment of receivers to take into custody all the property belonging to the Santa Fe Company, and to operate and manage the same pendente lite; and on the same date receivers were appointed by the court, and thereupon assumed and took full control of the operation and management of all the property of the Santa Fe Company. On June 11, 1894, the Postal Telegraph Cable Company (which is, for brevity, hereafter styled the "Postal Company"), filed in said district court an intervening petition in the cause, then pending, of the Union Trust Company against the Santa Fe Company. In the intervening petition, the appellant alleged in substance that it was incorporated under the laws of the state of New York, for the purpose of constructing, operating, and maintaining a general system of telegraph lines between each and every postoffice, village, town, and city in the United States; that it had accepted the condition prescribed by section 5263 of the Revised Statutes of the United

States, and had thereby acquired the right to construct, maintain, and operate lines of telegraph over the public domain of the United States, and over and along any of the military and post roads of the United States; and that it had obligated itself to transmit all government telegrams at such rates as might be fixed annually by the postmaster general of the United States, and to transfer its lines to the United States, as provided by law, above cited; that it owns, and has constructed, and now uses and maintains, lines of telegraph in the United States, connecting nearly all the principal cities east of the Rocky Mountains with each other, and has opened and maintains over three thousand telegraph offices, between all of which offices, when required, it transmits government telegrams at rates annually fixed by the postmaster general, such rates for the current year being far below the general rate to the public for like services; that it is now engaged in constructing a main or trunk telegraph line from La Junta, in the state of Colorado, via Albuquerque, New Mexico, over and along the line of the Atchison, Topeka & Santa Fe Railroad Company, from the northerly line of the territory to a point near Albuquerque, thence along the right of way of the Atlantic & Pacific Railroad in New Mexico and Arizona, and into the state of California, to Mojave, where it is to connect with the Pacific Postal Telegraph Company's lines; that the Santa Fe Company's system in New Mexico was constructed by the New Mexico & Southern Pacific Railroad Company, the Rio Grande, Mexican & Pacific Railroad Company, and the Silver City, Deming & Pacific Railroad Company, all chartered under the laws of this territory, which were, after construction, leased and operated by the said Santa Fe Company, and that all of said railroad companies are land-grant railroads, and have accepted and complied with the terms and provisions of the act of

congress approved March 3, 1875, and, as such, are entitled to a right of way, over and through the public domain, of one hundred feet on each side from the center of the track, and that all of said right of way has been occupied and used by each, for railroad and station purposes, and was taken substantially from the public lands of the United States; and that said Postal Company proposes to construct its line of telegraph upon and along the right of way in New Mexico, of all three of said railroads; that the said Santa Fe Company and the other railroads named are, by virtue of the laws of the United States, military and post roads, and that it, the Postal Company, is, by virtue of the laws of the United States, entitled to, and has the right to, construct its telegraph line over and along all military and post roads of the United States; that it applied to the receivers of the Santa Fe Company for the right to so construct, maintain, and operate its main and branch lines of telegraph, upon the right of way of the Santa Fe Company's system, and for the usual aid in distributing its poles, materials, supplies, and water for its men, while so constructing its lines, and offered to pay the usual and customary prices to said receivers for the transportation of the same, and to pay to said receivers a just compensation for any damages or injuries sustained for its use and occupation of the right of way, but that said receivers declined and refused to allow it to construct its telegraph line upon the right of way, and refused and declined to furnish the necessary aid and facilities for the same, alleging as a reason that a contract had previously been entered into between the Santa Fe Company and the Western Union Telegraph Company (which is hereafter called the "Western Union Company"), one clause of which they consider conflicted with the request of the Postal Company, and which the receivers felt bound to respect, until the court

should hold to the contrary; otherwise the receivers would be willing to grant the request of the Postal Company, on the payment of a proper compensation; that facilities are granted by the Santa Fe Company to the Western Union Company which are denied to the Postal Company, and that such denial by said receivers is grounded on the clause in said contract now existing between said Santa Fe Company and said Western Union Company, and that said clause in said contract is contrary to law and public policy, and therefore void; with a prayer for the relief sought. The receivers answered, and, among other things, show that they declined and refused to comply with the request of the Postal Company, on the ground that the Western Union Company insists on the validity and binding force of clause 12 in the contract between the Santa Fe Company and the Western Union Company, but, were it not for that clause, the receivers would grant the request of the Postal Company; that the construction of the main and branch lines of telegraph, by the Postal Company proposed, would increase the revenues, and add to the conveniences and facilities, of the property of the Santa Fe Company, in their hands as such receivers; that the receivers are advised and believe that the said twelfth clause in said contract, in so far as it relates to the right of way of the Santa Fe Company, and granting the same to the Postal Company, is void and of no binding force, but, owing to the demand made on them by the Western Union Company, they feel bound to respect it until the court shall have held it void, and submit to the court the question as to the validity of the said twelfth clause, and as to whether or not the Western Union Company was a necessary party to this proceeding. The contract referred to was entered into between the Santa Fe Company and the Western Union Company on the twenty-first day of November, 1888, and the twelfth

clause referred to in that contract reads as follows, to wit: "Twelfth. The railroad company, so far as it legally may, hereby grants and agrees to assure to the Western Union Telegraph Company the exclusive right of way on, along, and under the line, lands, and bridges of the railroad company, and all extensions and branches thereof, and of railroads owned, leased, operated, or controlled by it, or by corporations owned, leased, operated, or controlled by it, for the construction, maintenance, operation, and use of lines and poles and wires, and underground or other lines, for commercial or public uses or business, with the right to put up or construct, or cause to be put up or constructed, from time to time, in accordance with the provisions of this agreement, such additional wires and such additional lines of poles and wires, and underground or other lines, as the telegraph company may deem expedient; and the railroad company will not, except as legally required, transport men or materials for the construction, maintenance, or operation of a line of poles and wire, or wires, underground or otherwise, in competition with the lines of the telegraph company, party hereto, except at and for the railroad company's regular local rates, nor will it furnish, except as legally required, for any competing line, any facilities or assistance that it may lawfully withhold, nor, except as legally required, stop its trains, nor distribute material therefor, at other than regular stations, providing, always, that, in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, or of any other company owned, leased, operated, or controlled by it, but shall indemnify and save harmless the railroad company and its subordinate companies from any and all damages, costs, charges, and legal expenses incurred therein or thereby." The Western Union Company appeared, and

filed a demurrer to the intervening petition of the Postal Company, upon seven special grounds, and, after the hearing on the same, the court sustained the demurrer, and dismissed the intervening petition, from which decision the cause is here on appeal.

It is contended in this cause, in the brief of the appellee, that the Santa Fe Company filed the demurrer, but it is shown by the record that it was interposed for and on behalf of the Western Union Company, in the name of the Santa Fe Company, under and by virtue of the provisions in clause 12 of the contract, which provided, "Always, that in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company," etc. The railroad company, by its receivers, through their solicitors, appeared, and answered the intervening petition, and set up, as their defense, that they felt bound to decline the demands made in the said intervening petition, by reason of the covenants contained in the twelfth clause of the contract, until released from the same by the decision of the court holding the covenants therein contrary to public policy and void; and submitted to the court, in their answer, the further question "as to whether or not, under all the facts stated and set forth in this answer, and under the facts stated and set forth in the application, the Western Union Telegraph Company is a necessary party to this proceeding." The demurrer interposed is as follows, to wit: "(1) That said court is without jurisdiction to entertain or grant the prayer of intervener's petition in the summary manner proposed. (2) For that there is a defect of parties, it appearing from said intervener's petition and the answer of the defendant receivers, that the Western Union Telegraph Company has, or claims to have, rights which would be affected by the order sought; furthermore than it appears,

from said intervener's petition and the answer of defendant receivers, that the right of way of the said several railroad companies is, at least in part, over and through private grants, and that an additional burden or servitude placed upon said right of way would entitle the owners of abutting property to a hearing for compensation, and that all of said abutting owners, to be so affected, are necessary parties to the determination of this matter. (3) For that it is beyond the scope of the duties or powers of said receivers to grant, bargain, or sell any portion of the right of way, or to fasten upon the same any additional burden or servitude, all of which appears from the records of this court. (4) For that it is beyond the powers or jurisdiction of this court, by an interlocutory order or other interlocutory or collateral proceeding, to authorize the receivers to sell, bargain, or convey any portion of the right of way of said railroad company, or to incumber the same by any additional burden or servitude, for years or in perpetuity. (5) For that it appears, from the petition of said intervener and the answer of the receivers, that the Western Union Telegraph Company has paid a consideration to said railroad company for the faithful observance of all the terms of said contract between it, the said Western Union Telegraph Company, and said Atchison, Topeka & Santa Fe Railroad Company, including the covenant and provision complained of, and that there is in said petition or said answer no offer to pay or refund to said Western Union Telegraph Company said consideration, or any part thereof. (6) For there is no allegation in said petition of intervener that the said Postal Telegraph Cable Company has complied with any of the provisions of the laws of the territory of New Mexico relative to filing in the office of the secretary of the territory a copy of its charter, and the appointment of an agent, or otherwise authorizing it to do business of any kind

within said territory, or to have any standing in the courts in said territory. (7) For that the petition of said intervener does not state facts sufficient to constitute a cause of action." It is insisted by the appellee that the Postal Company can intervene only under sections 1890–1892, Compiled Laws 1884, and that the facts stated do not show that the Postal Company has sufficient interest in the cause pending to permit it to intervene. This contention can not be maintained, because this is an equitable proceeding, and the sections of the statute referred to relate only to actions at law. In the case at bar, the property involved is in custodia legis, and there is no more proper remedy or procedure than to allow the Postal Company to come in by intervention and litigate its rights, if it have any, and in such causes it is in the necessary and inherent power of a court of chancery to permit parties claiming an interest in the subject-matter in litigation to establish their rights, if they can, and to have them finally adjudicated and determined in the action then pending, and it is the nature of an examination pro interesse suo. Krippendorf v. Hyde, 4 Sup. Ct. 27; 2 Daniell, Ch. Prac. 1057; Vault Co. v. McNulta, 14 Sup. Ct. 915; Joy v. City of St. Louis, 11 Sup. Ct. 243. Many other cases might be cited where this practice has been followed. In Mercantile Trust Co. v. Atlantic & P. R. Co., 63 Fed. Rep. 513, United States District Judge Ross, in passing on this question concerning the California statute with respect to interventions, said: "The suit was therefore one in equity; and the California statute respecting intervention, relied on in support of the demurrer, does not, I think, have any application to the present proceeding. The property in question being in the hands of the officer of the court, there is no more appropriate way in which to present the alleged rights of the Postal Telegraph Company than by an intervening petition."

INTERVENTION: secs. 1890–1892, Comp. Laws: equity.

The sixth ground relied on in the demurrer is that the Postal Company, being a foreign corporation, has no standing in court, because it has not complied with the laws of the territory, in that it has not filed a copy of its charter in the office of the secretary of the territory, and has not designated an agent upon whom process may be served. This objection is not well taken, because it can not be raised in a collateral proceeding of this nature. A stranger or third person can not be heard to object to a foreign corporation doing business within the limits of this territory, on the ground that it has not complied with the statute which requires all corporations chartered under the laws of any other state or territory to file an authenticated copy of its charter, and of the laws of the state or territory granting the same, and a certificate designating upon whom process may be served, before it can do business in the territory. This objection must come first from the territory, in a direct proceeding in quo warranto brought for that purpose. It can not be raised in an action between individuals. High, Extr. Rem., sec. 724; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93; Cowell v. Springs Co., 100 U. S. 55; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, and cases there cited; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1.

RIGHT of action of foreign corporation: collateral attack.

The remaining point for consideration is as to the validity and legal force of the covenants in the twelfth clause in the contract entered into between the Santa Fe Company and the Western Union Company on the twenty-first day of November, 1888; and it is to continue in force for twenty-five years from that time. This superseded a similar contract entered into between the same corporations in January, 1872, and stripped of its legal verbiage, it means that the Santa Fe Company has conveyed

TELEGRAPH company: right of way along line of railroad: exclusive privilege: contract against public policy.

to the Western Union Company an exclusive grant and franchise, over, along, and through its right of way, for telegraphic purposes, and agrees not to aid or assist any other person, company or corporation in the construction, operation, and maintenance of any other telegraphic line along, over, or through its right of way, in so far as it may legally decline to do, and is an effort on the part of these corporations to create and maintain a monopoly of transcontinental telegraphic business in the Western Union Company, and in so far as this clause has this effect, it is contrary to public policy, and an attempt to cripple trade, in restraint of commerce, and is void. The Postal Company proposes to construct its line over the right of way of the New Mexico & Southern Pacific Railroad, from the north boundary line of New Mexico, at or near Raton, to the city of Albuquerque, which is a part of the Santa Fe Company's system; and it is shown in the answer of the receivers that this right of way was secured over the public domain, in large part, under and by virtue of the act of congress, approved March 3, 1875, granting a right of way to railroad companies over the public domain, of the width of one hundred feet on each side from the center of the tract. This line of road is a military and post road, having complied with all the requirements of law to make it such, and, by virtue of the laws of the United States, the Postal Company has the right and the authority to construct its line, poles, wires, etc., over, along, and upon the right of way, as proposed by it, so long as it in no way hinders or interferes with the necessary and proper management and operation of the railroad, and pays the railroad company a proper and customary compensation for any and all services performed by it, and pays to it due and proper compensation for any damages it may sustain by reason of the construction and maintenance of the telegraph line by the Postal

Company. "Any telegraph company now organized or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, and across the navigable streams or water of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and water, or interfere with the ordinary travel on such military or post roads." Rev. Stat. U. S., sec. 5263. This section has been the source of much discussion by many of the courts of the country, and in each case it has been held that the section quoted is in its nature prohibitive, as to the force and effect of any contract entered into by a railroad company, granting an exclusive privilege and franchise over and along its right of way over and through the public domain to any single telegraph company, where such railroad has acquired its right of way under and by virtue of an act of congress, or which are or may be declared military or post roads by act of congress. In W. U. Tel. Co. v. Burlington & S. W. R'y Co., 11 Fed. Rep. 1, in passing on a clause in a contract entered into between the railroad company and the telegraph company, which is similar in its nature and effect to the clause in the contract under consideration, Judge MCCRARY said: "In our opinion, it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade, and contrary to public policy. They are also in contravention of the act of con-

gress of July 24, 1866, which authorizes telegraph companies to maintain and operate lines of telegraph over and along any of the military and post roads of the United States which have been or may hereafter be declared such by act of congress. We therefore must hold the second subdivision of the contract void." In the case of Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, wherein the state legislature of Florida granted to the Pensacola Telegraph Company an exclusive franchise and privilege, for telegraphic purposes, over a certain portion of the territory of that state, in passing upon the injunction asked to restrain the Western Union from constructing its lines over that territory, Chief Justice WAITE, speaking for the court, said: "The state of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. * * * The state, therefore, clearly, has attempted to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction. The statute of July 24, 1866 (14 Stat. 221), in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce, and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege." This is just what the Western Union Company is now attempting to do. Its aim and effort is to

monopolize all the transcontinental telegraphic business through New Mexico, Arizona, and Southern California, by prohibiting the Postal Company from constructing a competing line for the transmission of telegraphic correspondence across this part of the continent. If a sovereign state, through its chosen representatives, has not the power to grant special privileges of this kind, then a corporation certainly can not. The general government has power to regulate, over every foot of its territory. It is not limited by state lines, and knows no boundaries, except national. The electric telegraph line is, at this day and time, as much a common carrier and national highway, in the transmission of telegraphic business and intelligence, as the railroads and the steam vessels; and the United States government will not permit its citizens to be compelled to do business with any one single individual or corporation, when other individuals and corporations offer to invest capital and engage as competitor for a share of the public and private business. The government has reserved to itself and to its citizens the right and privilege to share in the convenience and advantages produced by competitors for their patronage and support. In Mercantile Trust Co. v. Atlantic & P. R. Co., 63 Fed. Rep. 513, a case exactly similar to the case at bar, United States District Judge Ross, in passing upon the same clause, in the same contract entered into between the Atlantic & Pacific Railroad Company, in a very lucid opinion reviewed the several congressional acts and decisions of courts on that subject, and held the clause here in question contrary to public policy, in restraint of trade and commerce, and void.

But, it is insisted by appellee the Western Union Company that the act of congress in question does not apply, because it is shown by the record that a portion of the right of way of the New Mexico & Southern Pacific Railroad is over and through, in part, private

property, obtained by the railroad company by purchase, or by condemnation proceedings under the statute. In passing on this point, raised in the case of Pensacola Tel. Co. v. W. U. Tel. Co., supra, the supreme court of the United States say: "It is insisted, however, that the statute extends only to said military and post roads as upon the public domain; but this, we think, is not so. The language is, 'through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may be declared such by act of congress, and over or across the navigable streams or water of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they were therefore to be given their natural and ordinary significance." The Santa Fe Company never obligated itself to do more than it has done. It simply sold and conveyed to the Western Union Company a one half interest in its telegraph lines and telegraph business, for the consideration therein stated, and obligated itself to protect the Western Union Company in its exclusive privileges only in so far as it might legally do, and it has fulfilled its covenants by carrying them out on its part, and submitting the question as to the legality and binding force of these covenants to the courts for their interpretation and construction. Entertaining these views the court below erred in sustaining the demurrer interposed by the appellee in behalf of the Western Union Telegraph Company. The decision of the court below is therefore reversed, and the cause remanded, with directions to the district court to overrule the demurrer, and proceed in accordance with this opinion.

SMITH, C. J., and HAMILTON, BANTZ, and COLLIER, JJ., concur.

[No. 628. On Rehearing, August 5, 1896.]

ADDISON M. JANES ET AL., APPELLEES, v. MARCUS BRUNSWICK ET AL., APPELLANTS.

CLAIM AGAINST ESTATE—PROOF OF ALLOWANCE—LIMITATION.—Where a claim against an estate, filed with the clerk of the probate court, appeared to have been barred by limitation, and it did not affirmatively appear from the record that it had been allowed by the court,—Held: That the mere indorsement upon the account. of its approval by some one styling himself "probate judge," was not sufficient evidence of its allowance by the probate judge.

ON REHEARING. Remanded as to claim of S. B. Newcomb.

W. B. CHILDERS for appellee S. B. Newcomb.

Probate decrees are binding and conclusive upon both parties and privies until reversed or modified in the proper tribunal. Caujole v. Ferrie, 13 Wall. 465; Simpson v. Norton, 45 Me. 281; Bryant v. Allen, 6 N. H. 116; Spofford v. Smith, 59 Id. 366; Simmons v. Goodell, 63 Id. 458; Adams v. Adams, 22 Vt. 50; Lawrence v. Englesby, 24 Id. 42; Jennison v. Hapgood, 7 Pick. 1; Paine v. Stone, 10 Id. 75; Sever v. Russell, 4 Cush. 513; Crippen v. Dexter, 13 Gray, 330; Bush v. Shendon, 1 Day, 170; Goodrich v. Thompson, 4 Id. 215; Gates v. Treat, 17 Conn. 388; Dickinson v. Hayes, 31 Id. 417; Kellogg v. Johnson, 38 Id. 269; Blake v. Butler, 10 R. I. 133; Roach v. Martin, 1 Harr. (Del.) 548; Seymour v. Seymour, 4 Johns. Chy. 409; Chipman v. Montgomery, 63 N. Y. 236; Thompson v. McGaw, 2 Watts, 161; McPherson v. Cunliff, 11 Serg. & R. 422; Lex's appeal, 97 Pa. St. 289; Brinton's Estate, 10 Id. 408; Cecil v. Cecil, 19 Md. 72; Connolly v. Connolly, 32 Grant, 653; Harris v. Colquitt, 44 Ga. 663; Davie v. McDaniel, 47 Id. 195; King v. Smith,

15 Ala. 264; Herbert v. Hanrick, 16 Id. 581; Arnett v. Arnett, 33 Id. 273; Duckworth v. Duckworth, 35 Id. 70; Morrow v. Allison, 39 Id. 70; Hutton v. Williams, 60 Id. 107; Turner v. Malone, 24 S. C. 398; Bailey v. Dilworth, 10 Sm. & Mar. 494; Fort v. Battle, 13 Id. 133; McKee v. Whitten, 25 Miss. 31; Ward v. State, 40 Id. 108; Womack v. Womack, 23 La. Ann. 351; Dooley v. Dooley, 14 Ark. 122; Osborne v. Graham, 30 Id. 67; Gordon v. Kennedy, 36 Iowa, 167; Johnson v. Beasley, 65 Mo. 250; Sheetz v. Kirtley, 62 Id. 417; Dayton v. Mintzer, 22 Minn. 393; 29 Cal. 514; Kingsley v. Miller, 45 Id. 95; Reynolds v. Brumagin, 54 Id. 254; Estate of Cook, 14 Id. 130; Lewis v. Welch, 48 N. W. Rep. (Minn.) 608; Barber v. Bowen, 49 Id. (Minn.) 684; Herron v. Dater, 120 U. S. 465; Tate v. Norton, 94 Id. 746; Veach v. Rice, 131 Id. 293; Simmons v. Saul, 138 Id. 114; 2 Black on Judg., par. 633.

The approval of an account by a probate judge is a judgment or decree of said probate court. Rice, Probate Law, 452; Jones v. Brinker, 20 Mo. 87; Dooley v. Watkins, 5 Ark. 705; Tutt v. Boyer, 51 Mo. 425; Shoemaker v. Brown, 10 Kan. 290; Price v. Dietrich, 12 Wis. 699; Kennerly v. Shepley, 15 Mo. 410; Niel v. Hodge, 5 Tex. 489; Moore v. Hillebrand, 14 Id. 312; Cassett v. Biscoe, 12 Ark. 97; Moody v. Peyton, 36 S. W. Rep. 621.

It is not essential to the operation of a judgment or decree that it should be legally right, and is conclusive, unless it is shown that the court has no jurisdiction. 2 Black on Judgs., par. 514; Barber v. Bowen, 49 N. W. Rep. (Minn.) 684.

ON MOTION FOR REHEARING BY S. B. NEWCOMB.

BANTZ, J.—The rejection of this claim was not based on the theory that a judgment of the probate court could be collaterally attacked by showing that the

claim was barred by the statute of limitations; nor do we question that an allowance by the probate court is equivalent to a judgment of that court. But the objection is that the claim appeared to have been barred by limitation, and we did not find sufficient in the record to show that it had been allowed by the probate court. Proceedings in the probate courts are not conducted with a very strict regard to forms but it would be too unsafe to hold that a mere indorsement upon an account of its approval by some one styling himself probate judge was sufficient evidence of its allowance by the probate judge. It was not shown when or where this indorsement was made, nor that it was ever recognized, as the official act of one having authority, by the probate clerk. It may be that the proofs can be supplied; and therefore as to this claim the cause will be remanded for a further hearing before the master upon this subject.

SMITH, C. J., LAUGHLIN and HAMILTON, JJ., concur.

[No. 623. August 5, 1896.]

A. M. GENTILE, APPELLEE, v. CHARLES W. KENNEDY, MARGARET CROSSAN, AND ELLIOTT CROSSAN, APPELLANTS.

TITLE TO LAND, SUIT TO QUIET—POSSESSION—SEIZIN.—The possession of one entering upon land under a deed is coextensive with the land described in the deed; and where two persons are in actual possession of different parts of a tract of land, holding under adverse deeds, covering also land in dispute between them, the seizin of the land not in the actual occupancy of the adverse party is in him who has the better title. 3 Wash. Real Prop. 138; Clark v. Courtney, 5 Pet. 354.

ID.—EQUITY JURISDICTION.—In a suit to quiet title to land, where the constructive possession under the deed and the actual possession of part of the land showed the pedis possessio to be in complainant, and, moreover, neither party was in the actual or constructive possession, and there was no tenant to the praecipe against whom ejectment could be brought, equity alone could give relief.

APPEAL, from a decree for complainant, from the First Judicial District Court, Santa Fe County. Affirmed.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON and B. S. RODEY for appellants.

"A court of equity will not take jurisdiction of a bill for the mere purpose of settling disputed boundaries." Am. and Eng. Ency. Law, 693; Wilcott v. Robbins, 26 Conn. 226, note; Doggert v. Hart, 5 Fla. 215; Dickerson v. Stoll, 8 N. J. Eq. 294; Top v. Williams Humph. (Tenn.) 569; Bresler v. Pitts, 58 Mich. 347. See, also, Whitehead v. Shattock, 138 U. S. 146.

CATRON & SPIESS for appellee.

Where there is nothing special in the matter of reference, the findings of the master can not be reviewed, except in matters of gross mistake or irregularity, or where there is no evidence to support his findings, or where the great weight of the evidence is against the parties, and there is manifest error. Mason v. Crosby, 3 W. & M. 269; Metzger v. Bombrake, 108 U. S. 73; Harding v. Handy, 11 Wheat. 126; Kimberly v. Arms, 129 U. S. 524; Tilgham v. Proctor, 125 Id. 149, and citations; Calahan v. Myers, 128 Id. 666; Bridges v. Sheldon, 7 Fed. Rep. 35–37; In re Murray, 13 Id. 550; McDaniel v. Harbru, 43 Vt. 48; Howe v. Russell, 36 Me. 115; Richards v. Todd, 127 Mass. 172; Trow v. Berry, 113 Id. 146; Newcomb v. White, 5 N. M. 435; Davis v. Schwartz, 155 U. S.

This bill is maintainable, if for no other purpose, to wipe out the deed of Crossan and wife to Kennedy, and as makers of the deed they are proper parties to

join with him. When the court has jurisdiction for one purpose, it has it for all purposes which may be necessary to a complete settlement of the whole case. Pool v. Docker, 92 Ill. 509; Hawley v. Simons, 14 N. E. Rep. 7; Blakey v. Blakey, 9 Ala. 391; Pearson v. Darrington, 21 Id. 169; Martin v. Tidwell, 36 Ga. 332; Keeton v. Spradling, 13 Mo. 321; Sounder's Appeal, 57 Pa. St. 498; Sanborn v. Kittridge, 20 Vt. 632; Barnes v. Dow, 59 Id. 530; McMurray v. Van Gilder, 56 Iowa, 605; Bouldin v. Reynolds, 50 Md. 171.

The bill, to a certain extent, is intended to determine the boundaries of land, for which purpose it can be maintained whenever such determination is connected with the incidental fact that it will avoid a multiplicity of suits, as in this case. Deveany v. Gallagher, 5 Green (N. J. Eq.), 33; Fraley v. Peters, 12 Bush. (Ky.) 469; Perry v. Pratt, 31 Conn. 440; 2 Beach, Mod. Eq. Juris., sec. 102, and citations. See, also, 3 Pom. Eq. Jur. 1384, 1385, and citations; Merriman v. Russell, 2 Jones, Eq. 471; Atty. Gen. v. Stevens, 6 D. G. M. G. 136.

BANTZ, J.—This is a suit in chancery by bill to quiet title to certain lands. The appellants and appellee deraign title from substantially the same persons. The deed under which Gentile claims was made March 29, 1880, and conveyed to his grantor certain lands, as far as "the hills" (los lomas), or "The Hills" (Las Lomas). Crossan, one of the defendants (appellants), though he had inspected Gentile's deed, and had actual knowledge of his claim of ownership, formed the opinion that Gentile's title did not extend to the land in question; and on December 10, 1888, he sought the persons who had made the deed of March 29, 1880, and, under representations to them that it did not interfere with the title they had previously conveyed, procured from them another deed, conveying to Mrs.

Crossan the land in question and the adjoining land further east. Kennedy afterward bought an interest from Mrs. Crossan. Although it is a matter of no particular consequence in this case, it appears that the Crossans were purchasers with full notice, who have relied upon the accuracy of their opinion for the profit of the speculation. The case was referred to a special master, to take the proofs, and report his findings of fact and conclusions of law. The master found the law and the facts in favor of Gentile. The district court approved the report, and the cause is here on appeal.

It has been held by this court in a series of cases that the findings of a master upon conflicting testimony will not be disturbed where the record shows there is any evidence upon which such findings can be based. De Cordova v. Korte (Sup. Ct. N. M.; July term, 1895), 41 Pac. Rep. 526; Field v. Romero, 41 Pac. Rep. (N. M.) 517; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237. The deed under which Gentile holds bounds the lands on the east by "the hills." As to the location of "the hills," and as to the meaning of that description by reference to local objects, both sides introduced a mass of testimony. The master found the hills mentioned in the deed to lie east of and beyond the lands in question. That finding is abundantly supported by the evidence, and we would have reached the same conclusion.

But it is objected that a court of equity is without jurisdiction in this case; that the proper remedy was at law, by action in ejectment, where both parties may enjoy the constitutional right of trial by jury. It will not be necessary to pass upon or consider the validity of section 2214, Compiled Laws, which permits a bill to be brought to quiet title, whether the complainant be in or out of possession. A decision of that question is not necessary here. It is undoubtedly true that

courts of equity generally have no jurisdiction to quiet title unless complainant is in possession. Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129. In this case the master found that each party was in actual possession of portions of the land mentioned in his and her deeds, respectively,—Gentile on land lying west of Edith street; Crossan and Kennedy on land lying east of High street; the lands in controversy lying between, and of that neither party had the actual possession. The appellants contend that the finding of the master is not supported by the evidence, and that, in truth, the record shows beyond controversy that appellants were in the actual possession of the land in question, openly and exclusively.

We have carefully examined the record on this question, as counsel for appellants have insisted upon the point with great earnestness. The record shows that Gentile testified that a powder house built on the land near the junction of High street and the Tejeras road was put up by one of his tenants. Pizutti testified that, under directions of Gentile, he built a fence around the north, south, and west sides of the land in controversy, about two years before this suit was brought; that Crossan objected to the building of the fence while it was being done; but that it was built notwithstanding his objections; and that Crossan then built a fence across the east side of the land in question. The land was thus substantially inclosed, the east fence put up by Crossan separating this land from the lands upon which his house stood. Greenleaf, Capilupi, Krawinkle, and others testify to the existence of the fence around the four sides of this land; and Crossan admits that the three sides were put up by Gentile, and that he put up the fourth or east side fence himself. It appears from the testimony, and is not denied, that Gentile's solicitor called Crossan's

TITLE to land, suit to quiet: possession: seizin.

attention to the east fence, as defining the possession of the respective parties; and shortly afterward this fence put up by Crossan disappeared by some unknown agency. Crossan admitted that he saw notices of Gentile's claim of ownership posted on the land as far east as the place where Crossan's house was afterward built. About two weeks before this suit was brought, Gentile's solicitor saw Crossan's surveyor inside the inclosure, surveying the land. The surveyor was told of Gentile's ownership, and directed to leave, which he thereupon did. Some of the witnesses for appellants testify that Crossan resided upon the land, but it is undisputed that his residence house was east of the fence, and east of the land in dispute. Some of the witnesses called the fences inclosing this land "Crossan's fences," but this was evidently a mistake of fact or a bad guess at the law. Mr. Kennedy (appellant) testified that, when he bought, Crossan seemed to be in possession; but he admits that he did not know that Gentile had put up the fences on three sides, and that Crossan had built it on the other. Appellants admitted that the actual, open, and exclusive possession of the land lying west of Edith street had been held under the deed of March 29, 1880, since the date of said deed. There was also evidence to show that Crossan did some repairing of the fences, and paid the taxes, and turned some cows upon the land after the east fence had been removed.

The foregoing recitals from the testimony sufficiently show that appellants' contention is not well founded, as they not only do not show actual possession of the land in dispute by Crossan, but do show an actual possession by Gentile. The removal of the fence by the unknown trespasser, after Crossan had himself openly limited the extent of his actual possession, did not operate to enlarge the area of that possession. We do not think his claim of possession,

coupled with occasional acts, such as repairing fences, procuring a survey of the land, the grazing of cattle, and the payment of taxes, were in their nature so definite, exclusive, and notorious as to amount to an ouster of Gentile, who held, at least, the constructive possession arising from his deed and the actual possession of the adjoining lands also embraced in his deed. The law does not require so absurd a thing as that a person must occupy every inch of his land to maintain his possession of it. The rule is that the possession of one who enters upon land under a deed is construed to be coextensive with the tract described in his deed. 3 Wash. Real Prop. 138. And where two persons, as in the case at bar, are in the actual possession of different parts of a tract, each holding under adverse deeds, covering also land in dispute between them, but neither of them is in the actual possession of the land in dispute, then the law adjudges the seizin of all of the land not in the actual occupancy of the adverse party to be in him who has the better title. Clarke v. Courtney, 5 Pet. 354. Both can not be seized, and seizin consequently follows the title. 3 Wash. Real Prop. 138. It is "a principle of universal application that the law never raises a constructive possession against the real owner of land;" and "if an entry be wrongful, though it be under a deed, a possession thereby gained will only extend so far as the tenant shall actually occupy the premises." Id. 164. "If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, the constructive possession is in him of all the land not in the actual possession of the intruder" (Hunnicutt v. Peyton, 102 U. S. 333); and that constructive possession continues until there has been an ouster by actual adverse possession (Ewing v. Burnet, 11 Pet. 41). Gentile stands in that position. He has the better title to the land in dispute, and his deed covers that land, and also the

adjoining land, of which he has the conceded possession. The constructive possession of the land in question by Gentile since 1880 being shown, that possession must be presumed to continue until its loss by ouster has been proved. 3 Wash. Real Prop. 156. Nothing which appellants have done amounts to such ouster, rendering it at all necessary for him to bring ejectment. If a trespasser, however loud and persistent his claim of ownership, can work an ouster by irregular, occasional, or equivocal acts, though under color of a deed, the statute of limitations would be put in motion against the true owner, it may be without adequate warning of the peril to his title, and he would lose his property or be put to the expense of an action in ejectment. Therefore the law wisely holds that an ouster disseizin must be manifested unequivocally, by some open, visible, continued, and exclusive exercise of ownership done on the land adverse to him who has constructive possession; and, until such an ouster is shown, constructive possession is not lost, and an action in ejectment is not necessary. While there is great difficulty in laying down precise rules by which the question of adverse possession is to be determined in all cases, certain general rules are well established. "In the first place, inasmuch as the title of the true owner may, by the statute [of limitations], be often divested by the wrongful act of another, the law is stringent in requiring clear proof of the requisite facts." There must be—First, an actual occupancy, clear, definite, positive, and notorious; second, it must be continued, adverse, and exclusive; and, third, it must be with an intention to claim title to the lands occupied. 3 Wash. Real Prop. 146. The master found that neither party was in the actual possession of the disputed land. No injury was done appellants by that finding, as we are disposed to believe that the inclosure of the lands was sufficient evidence of the

EQUITY JURISDICTION.

actual possession by Gentile. The question remaining is whether, under the findings of the master, the court has jurisdiction. We think the constructive possession under the calls of the deed, and the actual possession of the land west of Edith street, show the pedis possessio to be in Gentile, and that it gives him a standing in a court of equity to the relief here sought. But, moreover, when neither party is in the actual or constructive possession, and there is no tenant to the praecipe against whom ejectment can be brought, equity alone can afford relief. Whitehead v. Shattuck, 138 U. S. 150; Holland v. Challen, 110 U. S. 15; Ely v. Railroad, 129 U. S. 291. There is no error in the record. The decree will, therefore, be affirmed.

SMITH, C. J., and HAMILTON, J., concur.

[No. 617. August 5, 1896.]

M. W. STANTON, APPELLANT, v. THOMAS. B. CATRON, APPELLEE.

CREDITOR'S BILL—SUFFICIENCY OF ALLEGATIONS.—A judgment creditor causing property to be levied on and advertised for sale under the judgment, can not maintain a bill to remove, as a cloud upon the title, a conveyance of the property by the judgment debtor, made after the judgment lien attached, upon a mere allegation that, by reason of such conveyance, sufficient could not be realized from the sale of the property to satisfy the judgment, where it is not alleged in the bill that the judgment debtor has no other property out of which the judgment might be satisfied.

ID.—BILL TO QUIET TITLE—JURISDICTION.—A creditor's bill based upon a judgment lien on land, does not set forth such interest in the land as to vest the court with jurisdiction to entertain the suit to quiet title to the property.

APPEAL, from an order sustaining a demurrer to the bill, from the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

A. B. McMILLEN for appellant.

A mortgagee is entitled to enforce his lien, no matter what his remedy at law may be. Ober v. Gallagher, 93 U. S. 199; Case v. R. R., 101 Id. 199.

Adequate relief requires that the rights of the parties be determined, and all obstructions removed, so that the appellant may know what interest he is selling, and the purchaser what interest he is buying. Freeman on Executions, sec. 430.

One who has a judgment lien on real estate may maintain an action to have the lien declared superior to a claim asserted to be superior to it, or to have any obstruction removed. McAfee v. Raynolds, 130 Ind. 33; 30 Am. St. Rep. 194; Lamson v. Jorden, 19 Ark. 297; 70 Am. Dec. 601; Myers v. Hewitt, 16 Ohio, 449; Tuck v. Old, 29 Fed. Rep. 738; Jones v. Green, 1 Wall. 330; Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275.

The statutes make any claim of title a cloud, and the same may be removed by a bill to quiet title by anyone having or claiming an interest in the land. Comp. Laws 1884, sec. 2214. And a judgment creditor having no title to lands in controversy, but only a general lien, may maintain such an action. Shaw v. Dwight, supra. See, also, the following decisions under similar statutes. Holland v. Challen, 110 U. S. 15; Raynolds v. Bank, 112 Id. 405; Frost v. Spitley, 121 Id. 552; Moore v. Stinebach, 127 Id. 70; Ely v. R. R., 129 Id. 291.

NEILL B. FIELD for appellee.

The demurrer only admits what is well pleaded. It does not admit mere legal conclusions, as "that Catron's deed would be a cloud upon the title of the purchaser." Dollin v. Barnard, 21 Wall. 437; Lea v.

Robeson, 12 Gray, 280; Branham v. San Jose, 24 Cal. 602.

Courts of equity have jurisdiction, upon proper application by a judgment creditor, to remove obstructions to the enforcement of the final process of a court of law, but, to entitle him to such relief, there must be a judgment of a court of competent jurisdiction; an execution in the hands of a duly qualified officer; and an unlawful or fraudulent obstruction to the enforcement of the execution. They will only in extraordinary cases go further and collect the debt by decreeing a sale of the property unlawfully or fraudulently conveyed. Bump. on Fraud. Convey. 566, and citations.

The bill is fatally defective, in that it contains no allegation that Baca was not the owner of the property sufficient to satisfy the execution without resort to that deeded to Catron. Brinker v. Kelsey, 72 Ind. 51; Adams v. State, 87 Id. 803; Sherman v. Hoaglund, 73 Id. 472; Spaulding v. Blythe, Id. 93; Emery v. Yount, 7 Colo. 107.

The bill contains no allegation that complainant exhausted Baca's other property before attempting to sell the land embraced in Catron's deed, and is fatally defective for that reason. 1 Black on Judgs., sec. 440; James v. Hubbard, 1 Paige, 228; Bank v. Creswell, 100 U. S. 630.

The bill is multifarious under every definition of that term. 15 Am. and Eng. Ency. of Law, 947.

A bill to quiet title can not be maintained in equity, independent of statute, without clear proof of both possession and legal title in the complainant. U. S. v. Wilson, 118 U. S. 86; Caton v. Smith, 18 How. 263; Hipp v. Babin, 19 Id. 271; Ellis v. Davis, 109 U. S. 485; Kellain v. Ebbinghaus, 110 U. S. 568; Fussell v. Gregg, 113 U. S. 550.

Our statute attempts to dispense with the requisite of possession, but not that of legal title. Frost v. Spitley, 121 U. S. 552; Holland v. Challen, 110 Id.

HAMILTON, J.—This cause comes to us by appeal from the Second judicial district, where a decree was entered sustaining a demurrer and dismissing the bill of complaint. The allegations contained in the bill, to which a demurrer was sustained, are substantially as follows:

That on the twelfth day of August, 1893, the complainant, M. W. Stanton, obtained a judgment in the district court in and for the county of Valencia, in the territory of New Mexico, against one Roman A. Baca, for the sum of $1,793 damages, and $23.57 costs of suit; that on the fifteenth day of August, 1893, said judgment was duly docketed by the clerk of said district court, in a book kept in his office for that purpose, and on the same day a certified transcript of the docket of said judgment was duly filed with the probate clerk and ex-officio recorder of Bernalillo county, in said district, which said transcript was by said recorder duly filed and recorded in a book kept in his office for that purpose, by which record of said transcript of said judgment in said county of Bernalillo the said complainant acquired a lien on all the real estate of said Roman A. Baca in said Bernalillo county, from the date of the filing of said transcript; that on the eighth day of September, 1893, said complainant caused an execution to be duly issued out of said district court of Valencia county and delivered the same to the sheriff of said county; that the said sheriff afterward, to wit, on the twenty-seventh day of October, 1893, returned said execution nulla bona, said Valencia county being where said Roman A. Baca resided.

It is then charged in the bill, in paragraphs 7 and 8, that at the time of the rendition of said judgment and the filing of the transcript in the county of Bernalillo, the said Roman A. Baca was the owner of an interest in certain land in said bill mentioned, known, and called the Bartolome Fernandes or San Miguel Spring Grant,

which land is fully described in the bill. It is further charged in the bill in paragraph 9, that on the eighth day of May, 1894, the said complainant caused to be issued out of the district court in and for the county of Valencia another execution, and on said day delivered the same to the sheriff of the county of Bernalillo; that said sheriff thereupon on said day levied said execution on all of the right, title, and interest of the said Roman A. Baca in and to the said above described real estate, and the said sheriff under said execution proceeded to advertise said land for sale to satisfy the said execution. It is further charged in said bill, in paragraph 10, that:

"Your orator further represents that thereafter, to wit, on the twenty-sixth day of May, A. D. 1894, the defendant, Thomas B. Catron, caused to be filed with the probate clerk and ex-officio recorder of the county of Bernalillo a deed of bargain and sale from the said Roman A. Baca to the said Thomas B. Catron, being dated the eighteenth day of April, 1894, wherein and whereby the said Roman A. Baca conveyed to the said Thomas B. Catron all his right, title and interest in and to the land hereinbefore described, and the said Catron gives it out and claims that he holds the said land free from the judgment lien of your orator, and that his claim to said premises is superior thereto."

It is also charged in said bill, paragraph 11:

"Your orator further shows that if said land might be sold upon said execution, that the remedy thereby would be inadequate, that said conveyance to said Catron would be a cloud on the title of a purchaser under said execution and said land can not be sold for its reasonable value, except under an order of this court, adjusting the rights of the respective parties herein."

Then follows a prayer that the several liens of the said complainant and the said defendant be marshalled

and the amounts thereof ascertained, and that the lien of the complainant be decreed by the court to be a superior and prior lien to the claim of the defendant, Catron, and that the property be sold and the proceeds thereof brought into court for distribution according to the several priorities of the parties litigant herein. To this bill the defendant, Catron, filed a demurrer in the court below, upon the ground, first:

"That the said complainant has an adequate remedy at law for the redress of the grievances, if any, set out in said bill of complaint; and, second, that the said complainant has not, in and by his said bill, made or stated such a case as entitles him in a court of equity to any relief from or against this defendant, touching the matters contained in said bill, or any of such matters."

This demurrer was sustained by the court below, and the complainant declining to amend his bill, but electing to stand upon the sufficiency thereof the court entered a decree dismissing the bill, from which an appeal has brought the case to this court.

The complainant assigns as a ground for the reversal of the decision of the court below, first:

"That the district court erred in sustaining the demurrer to the bill of complaint; second, that the district court erred in dismissing complainant's bill of complaint."

The question is presented for our consideration as to whether the ruling of the district court was correct in sustaining the demurrer and dismissing the bill.

Courts of equity entertain jurisdiction at the suit of a judgment creditor in those cases where the bill discloses a state of facts showing that the remedy at law is inadequate to accomplish the relief. In those cases where a discovery of assets is sought to be obtained; or where it is desired to reach equitable or other interests in property not subject to levy and sale under an

execution at law; or where a fraudulent or collusive conveyance has been made with the view of placing the property of the debtor beyond the reach of levy and sale under an execution, a court of equity will lend its aid to the creditor in securing to him that relief which he could not otherwise obtain. It may be said therefore, that there are at least three classes of cases in which the creditor may successfully appeal to a court of equity for aid in the enforcement of his demands against a debtor. First, in those cases where he seeks the satisfaction of his debt out of a trust fund, which is not subject to the demands of a judgment and execution at law. In this class of cases it is said that he may come directly into a court of chancery without first resorting to a judgment and execution at law.

As stated by Chief Justice MARSHALL, in the case of Russell v. Clark's Executors, 7 Cranch, page 87:

"If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

The jurisdiction in this class of cases is based upon the peculiar right of a court of chancery to decree and enforce a trust. It is not pretended by the complainant in the case at bar, that he comes within this class of cases; he is not seeking satisfaction out of a trust fund belonging to his debtor which is beyond the power of a court of law to reach.

Another class of cases is where the creditor after having obtained his judgment at law, seeks to set aside and remove a fraudulent conveyance made by the debtor, by which the property of the debtor has been placed beyond the reach of an execution. In a case like this, it is said, the creditor may come into a court of chancery as soon as he obtains his judgment and ask to have the fraudulent conveyance set aside without wait-

ing for the return of an unsatisfied execution. It can not be contended that the complainant has brought himself, by the allegations of his bill, within this class of cases; it is not stated or pretended in any of the allegations of the bill that the deed from Baca to Catron was fraudulent and void, or that it was made collusively or with the intention to defraud the complainant or any of the creditors of Baca. There is not a line or word in the bill that charges the deed to have been made fraudulently and without consideration. For aught that appears on the face of the bill, Catron may have bought this land in the utmost good faith and for a valuable consideration paid by him to Baca. Indeed, we must assume, in the absence of an allegation in the bill to the contrary, that Catron bought this land in good faith and for a valuable consideration, subject only to the rights of the complainant under his judgment lien.

Another and a much larger class of cases in which the creditor more frequently calls upon a court of chancery, are those where the creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to levy and sale under an execution at law; where he seeks to remove an obstruction or a hinderance in the way of the enforcement of his levy and sale of the property. If the complainant could have any standing in a court of chancery for the enforcement of his demands in this case, it must be that he intends to bring himself under this latter class of cases.

Do the allegations of the bill show a state of facts which entitles the complainant to the aid of a court of equity in the enforcement of his demands under his execution? It is a proposition too well settled by a line of decisions, both state and federal, to admit of controversy, that in this latter class of cases in order that a creditor may successfully call upon a court of

chancery for help he must first have exhausted his remedy on the law side of the court by obtaining a judgment and getting an execution with return thereon unsatisfied. In other words, the remedy at law must be exhausted before he can come into a court of equity for the purpose of reaching the equitable estate of the defendant. It is necessary that this should be done in order to give a court of chancery jurisdiction, because if this is not done, it will not appear but that the party may have a complete and adequate remedy at law. The judgment must be obtained, execution issued, and there must be a return thereon unsatisfied, before he can maintain a creditor's bill to reach the property not subject to execution. This is the general, if not the universal, rule, and these facts must appear upon the face of the record itself. See Miller v. Davidson, 44 Am. Dec. 715; Jones v. Green, 1 Wall. 330; Stewart v. Fagin, 2 Woods, 215; Public Works v. Columbia, 84 U. S. 521; 3 Pomeroy's Equity Jurisprudence, secs. 14, 15. Also see cases in note in case of Jones v. Green, 68 U. S., L. C. P. Company.

The only allegation in this bill upon which the complainant could ask relief is as follows:

"Your orator further shows that if said land might be sold upon said execution that the remedy thereby would be inadequate; that said conveyance of Catron would be a cloud upon the title of the purchaser under said execution, and said land can not be sold for its reasonable value except on an order of the court adjusting the rights of the respective parties herein."

The bill shows that the judgment was obtained on the twelfth of August, 1893; that a transcript thereof was on the fifteenth day of August, 1893, filed and recorded in the probate clerk's office in Bernalillo county, making it a lien upon the property of Baca in that county. The deed to Catron was not made until the eighteenth day of April, 1894, some eight months

afterward. The complainant had issued an execution which was in the hands of the sheriff of Bernalillo county, and a levy was made upon the property and the property advertised for sale when he filed this bill. It must appear, therefore, from the affirmative allegations of the bill, that the complainant has not exhausted his remedy at law. He did not sell the property under his levy and advertisement, and he does not show any reason for not having done so. He admits indirectly that the property might have been sold under his execution; he does not allege that the deed of Catron in any way obstructed or prevented the sale, or that by the execution of that deed to Catron he was in any way prevented from selling the property and passing title to the purchaser under that sale. He says that the remedy at law would be inadequate; in what way he does not state; he does not allege any facts from which it can be seen that the remedy at law would not be adequate by a sale under his execution. This is the statement of a conclusion, and not the allegation of a fact from which the court can see that the remedy would be inadequate. He should have sold the property under his execution, or at least should have attempted to do so, or should set forth some good reason for not doing so, and had a return of that execution, and thus be able to show to the court that his remedy at law was inadequate and incomplete. For aught we know, purchasers may have been ready to buy the property under his sale, and he might have obtained satisfaction of his judgment. In view of the facts as stated upon the face of the bill, that his execution stood upon a judgment antedating the deed to Catron, we can not assume that purchasers would not have been at that sale, or that the sale would have been in any way hindered or obstructed by the existence of Catron's deed. It is not the province of a court of chancery to lay hold of executions from the law courts and enforce

them until the parties holding such executions have exhausted their power to collect under them.

In the case of Brinkerhoff v. Brown, 4 Johnson's Chancery Reports, page 675, the court uses this language:

"I apprehend this to be the settled rule in chancery; and that this court does not, as of course, assume jurisdiction, in taking executions upon judgments at law into its own hands. Such power would be oppressive to the debtor and to the court. The presumption is, that the court which renders judgment is competent to enforce it; and it is only in special cases, in which property can not be found to satisfy it, that this court interferes to discover and reach the property. But the legal remedy by execution must first be tried. The court is not to know by anticipation that it will be ineffectual. Upon such an allegation, it might assume the collection of all simple contract debts, in the first instance, without even requiring the creditor to prosecute his demand to judgment at law. It is sufficient, however, to observe, that I find the rule to have been long and uniformly established that, "to procure relief in equity by a bill brought to assist the execution of a judgment at law, the creditor must show, that he has proceeded at law to the extent necessary to give him a complete title."

This rule is established in this decision and in other cases referred to by the court in that opinion.

In the case of Jones v. Green, above mentioned, 1 Wall. 330, in considering this question as to the right of a creditor to maintain a bill without having first exhausted his remedy at law under execution, Justice FIELD, who renders the opinion, uses this language:

"The objection, that the complainants have not shown any attempt to enforce their remedy at law is fatal to the relief prayed. A court of equity exercises its jurisdiction in favor of a judgment creditor only

when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it.

"In the first case, the court, when its aid is invoked, looks only to the execution and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued and, of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule, the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy."

The facts in the case at bar show that the remedy has been pursued by obtaining the judgment and issuing the execution, making the levy and advertising the property for sale, but at this latter point the complainant seems to have abandoned his remedy, turned back and given up the pursuit before ascertaining what could be accomplished by the sale of the property under his advertisement. This shows that the complainant has not exhausted his remedy at law, but has abandoned it before ascertaining what could be accomplished under it.

It is insisted by the complainant that his execution and sale will be ineffectual to collect the money, and that the property if sold will not bring sufficient to pay his debt. We can not assume from the allegations of the bill that this would be the result. If we were to assume jurisdiction in this case upon the facts stated, then we might assume jurisdiction in the case of any execution upon an allegation that the property would not bring sufficient money to pay the debt. It is not sufficient

CREDITORS' bill: sufficiency of allegations.

for us to assume that the remedy at law would be incomplete upon a mere allegation that the property of the debtor at the sale under the execution will not bring its full value.

Another point which is fatal to the right of the complainant to maintain his bill is the fact that the bill fails anywhere to allege that the defendant Baca had no other property out of which this judgment might be satisfied, and upon which levy might be made and the money collected. For aught that appears on the face of the bill, the defendant Baca may have in the county of Bernalillo other property of ample value out of which this execution might be satisfied. The bill is entirely silent upon this question, and we can not assume, in the absence of such an allegation, that the defendant Baca had no other property out of which the execution might be satisfied, save that upon which the levy was made. We understand it to be the rule, that in order to successfully invoke the aid of a court of equity on behalf of a judgment and execution creditor, he must allege in his bill, and prove at the hearing if denied, that the debtor had not sufficient other property liable to sale and execution out of which to satisfy the judgment. Payne v. Sheldon, 63 Barber, 161; Clarkson v. DePeyster, 3 Paige, 320; Brinkerhodd v. Brown, 4 Johnson, 671; James v. Hubbard, 1 Paige, 228; Savings Bank v. Creswell, 100 U. S. 630.

We therefore conclude that the complainant has not exhausted his remedy at law, or alleged a state of facts upon which a court of equity could give him the relief prayed for.

Another ground upon which the appellant contends for the right to maintain this bill is, that this is a suit to quiet title brought under section 2214, of the Compiled Laws; that although he is simply a judgment creditor claiming a lien upon the property, he has the right to maintain

BILL to quiet title: jurisdiction.

were in cases of this character, and has dispensed with the possession of the plaintiff as a necessary prerequisite to his right to maintain the suit. While the statute has thus enlarged the jurisdiction and has dispensed with the necessity of possession in the plaintiff, yet it has not done away with the other requirements necessary to be alleged and proven as a prerequisite to his right to maintain the suit. While possession in the plaintiff is no longer necessary, the allegation and proof of title in some form in the plaintiff would seem to be still left undisturbed as a necessary foundation upon which to base his right to sustain the action. The allegation and proof of title has ever been the basis of this form of action in courts of equity prior to the adoption of the statutes in the several states upon this subject. It has ever been the title of the plaintiff which he has sought to have quieted against the demands of an adverse interest. It is his title which is the groundwork of the action. Can it be said that the legislature, in their enactment of these statutes to quiet title have done away with the necessity of alleging and establishing the very thing which they intend the court shall determine and quiet, to wit, the title of the plaintiff? Statutes of a similar character to that of ours, but differing slightly in form and phraseology, have been adopted in many of the states and territories. The adoption of these statutes has had a wholesome and salutary effect in providing a remedy by which may be settled the conflicting claims to land, giving repose and security to titles, and thus aiding in the growth and upbuilding of the country in the localities in which they are adopted. As observed by Justice FIELD, in speaking of those statutes, in the case of Holland v. Challen, 110 U. S. 21:

"It is certainly for the interest of the state that this jurisdiction of the court should be maintained, and that the causes of apprehended litigation respect-

ing real property, necessarily affecting its use and enjoyment, should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of every day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of "lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country."

The object and purpose to be accomplished by these several statutes is distinctly set forth and may be clearly gathered from the language of their several enactments. Manifestly, it is for the purpose of settling controversies to real estate, establishing the title thereto, and giving repose and security to the successful litigant against the demands of an adverse claim thereon. They remove some of the hardships and inconveniences under the old rule and allow the complainant, whether in or out of possession, to come into a court of equity and establish his title against the adverse demands of the conflicting claimant. It is not a controversy between conflicting liens arising either between a judgment creditor upon the one hand and a mortgagee on the other, or between a judgment creditor and a purchaser, that is to be settled under these statutes. It is not to marshal, establish and quiet liens that these statutes are enacted, but to establish and quiet the title to real estate. If it be the title to the land that is to be established and quieted, how is this to be done unless the plaintiff be required to assert and prove his title? If he has no title what has he to quiet? Manifestly nothing. How can he ask a court of equity to establish and quiet for him that which he has not, and

to which he does not lay any claim or offer proof to establish? He should come into court asserting his title before the defendant should be required to establish his adverse interest. He should establish this title as the foundation upon which a court of equity may construct a decree giving to him the quiet and uninterrupted enjoyment of his estate. This, we understand to be the settled rule in both federal and state courts under statutes of this character. In the case of Holland v. Challen, above referred to, the supreme court had under consideration the statute of Nebraska containing the following language:

"That an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate."

Justice FIELD, in rendering the decision in that case, page 25, observes:

"Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will properly rest with the court."

Also in the case of Frost v. Spitley, 121 U. S. 557, the court, in passing upon the same statute, reaffirms the doctrine of the former decision, and say:

"The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills. Under that statute, as under the general jurisdiction in equity, it is 'the title,' that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests."

This was a bill to quiet title to real estate in Nebraska brought under the same statute, and the court held that a bill in equity to quiet title could not be maintained under the general equity practice or under the Nebraska statute by one having a mere equitable title alone; that under the peculiar language of the Nebraska statute, viz., "any person or persons claiming title to real estate," it required that the plaintiff should show a legal title before he could maintain his action. The same court, in the case of Reynolds v. Crawfordsville Bank, 112 U. S. 405, had under consideration a bill to quiet title brought under a statute of Indiana, which reads as follows:

"An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title."

In that case the party asserted title under a quit-claim deed, and the court reaffirmed the doctrine of the former cases, but held, that under this statute an equitable title was sufficient to justify the relief prayed for. In the case of Stark v. Starr, herein referred to, the supreme court of the United States had under consideration a suit to quiet title under a statute of the state of Oregon, as follows (6 Wall. 409):

"Any person in possession of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

On a final hearing the court reversed the case and ordered the bill dismissed, holding that even under this broad statute of Oregon providing "any person in possession" may maintain the suit, that his possession must be accompanied with a claim of right; "must be

founded upon title." After quoting the statute, Justice FIELD observes:

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the lan guage of the statute is that "any person in possession, by himself or his tenant, may maintain" the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

The statute of Oregon, under which this decision was rendered, it will be observed is broader than ours. That statute gives the right to any person in possession. The statute of Indiana, passed upon in the case of Reynolds v. Bank, gave the right to any person, in or out of possession, having an interest in reversion or remainder. Under these statutes the supreme court declared that to maintain the suit the party must have a legal or equitable title to the land. Our statute gives the right to "anyone having or claiming an interest therein." Having or claiming an interest in what? In a mere judgment lien or other disputed security upon the land? Clearly not; but an interest in the title to the real estate, the title to which it is sought to have quieted. The language of our statute is almost identical with the statute of Indiana, and is less broad than that of Oregon, and the rule which has been adopted by the supreme court of the United States in passing upon these statutes applies with equal, if not greater, force to the statute of New Mexico. It therefore follows that the complainant must come into court asserting in his pleadings and establishing by his proofs

a title, either legal or equitable, to enable him to maintain his suit under the statute to quiet title.

The bill in this case shows the complainant to be a judgment creditor claiming a general lien, by virtue of his judgment, upon the lands in controversy. No title to the property is asserted. What relation does a judgment creditor bear to the land of the debtorupon which he has a general lien by virtue of his judgment? Not that of an owner of the property, or one having an interest or right in the title to the land itself, but simply that of a general lien upon the lands, which confers upon the judgment creditor the right to levy upon and sell the same to the exclusion of other adverse interests subsequent to the judgment. The title to the land is not transferred by the judgment from the judgment debtor to the judgment creditor, but remains in the judgment defendant. Other judgment creditors may levy upon the land and sell it. The debtor may sell and dispose of the land and pass title thereto in any way he sees fit, subject of course to the rights of the creditor under the lien of his judgment. The judgment creditor is simply vested with the power to make the general lien of his judgment effective in pursuing the remedy which the law gives in issuing execution, levy and sale of the land. By following up diligently the remedy which the law has given him he may thus vest himself with a title in the specific land on which theretofore he had only a general lien. Until this is done no title to the land passes to or is vested in him. His judgment is simply a link in the chain which may be lengthened into a title in his favor. This view we understand to be sustained by the supreme court in the case of Conrad v. Atlantic Insurance Co., 1 Peters, 386, 443; Brown v. Pierce, 7 Wall. 207; 1 Black on Judgments, sec. 400, and cases cited; Young v. Templeton, 50 Am. Dec. 563.

The appellant in this case having based his suit

upon a judgment lien, has not stated or set forth such title in the land or interest in the title as to vest the court with jurisdiction to entertain his suit to quiet title to the land mentioned.

The decree of the district court sustaining the demurrer and dismissing the bill was correct and will be affirmed.

SMITH, C. J., LAUGHLIN and BANTZ, JJ., concur.

[No. 384. August 6, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. PATRICK CARMODY, APPELLANT.

JURY, PETIT, IMPANELING OF, WHEN EXHAUSTED BY CHALLENGES—CONSTRUCTION OF STATUTES.—Section 5 of the Act of February 18, 1887, in relation to the selection of jurors, applies only to vacancies in the regular panel, and when a sufficient number of petit jurors can not be obtained from the regular panel for the trial of a particular cause. the panel must be completed by summoning by-standers or by an open venire addressed to the sheriff, as required by Compiled Laws, sections 634, 635, 638; the court can not direct the filling of the jury from a special list returned by the commissioners, by its direction, to be drawn from in such case.

APPEAL, from a judgment of the Fifth Judicial District Court, Socorro County, convicting defendant, with others, of murder in first degree. Reversed; SMITH, C. J., and LAUGHLIN, J., dissenting.

The facts are stated in the opinion of the court.

HENRY L. WARREN and NEILL B. FIELD for appellant.

Where jurors on the voir dire state that they have formed opinions, which it would require evidence to remove, it is sufficient ground for challenge, although formed from rumor or newspaper statements, in the absence of statute. 1 Chitty, Crim. Law, 542; 2 Hawk.

P. C. Chy. 43, sec. 28; People v. Rathbun, 21 Wend. 509; Willis v. State, 12 Ga. 444; Sprouce v. Com., 2 Va. Cas. 375; Hillard on New Trials [2 Ed.], 175; People v. Cattle, 6 Cal. 227; Smith v. Eames, 36 Am. Dec. 515; Armestaed v. Com., 37 Id. 633; State v. Johnson, 1 Wall. 392; State v. Plowen, Id. 38; People v. Johnson, 46 Cal. 78; Oslander v. Com., 3 Leigh (Va.), 780; Neely v. People, 13 Ill. 687; People v. Keefer, 97 Mich. 15, 56 N. W. Rep. 105; Clark's Crim. Prac. 446, and citations; 1 Bish. Crim. Prac., secs. 908, 910; 1 Thomp. on Trs., secs. 80, 115.

The fact that a juror's mother and the mother of the wife of one of the jurors were sisters, was not sufficient for challenge. 1 Chitty, Crim. Law, 541.

In capital cases, at least, jurors must be selected as required by the statutes in force. U. S. v. Rose, 6 Fed. Rep. 36; Clinton v. Englebrecht, 3 Wall. 434; Lovejoy v. U. S., 128 U. S. 7; Elkin v. State, 1 Tex. App. 539; Clawson v. U. S., 114 U. S. 78; Shackleford v. State, 2 Tex. App. 385; State v. Clark, 42 Vt. 629; Reid v. State, 50 Ga. 556; Lamb v. State, 36 Wis. 424; State v. McAfee, 64 N. C. 339; Morgan v. State, 31 Ind. 93; Gardner v. Turner, 9 Johns. (N. Y.) 260. See, also, as to construction of statutes, Endlich on Inter. Stats., sec. 710; Suth. Stat. Const., secs. 152, 451. And as to list of regular panel to be served on defendants in criminal cases: Comp. Laws, sec. 2489; Territory v. Ryan, 1 N. M. 640; Territory v. Kelly, 2 Id. 292; State v. Buckner, 25 Mo. 167; 1 Bish. Crim. Prac., sec. 32; 1 Thomp. on Trs., sec. 17.

The court erred in refusing to allow defendants any peremptory challenge in addition to the twelve exercised by the defendant Carmody. 1 Bish. Crim. Proc., secs. 921, 941, 1031; Clark's Crim. Prac. 449; 1 Thomp. on Trs. 115. See, also, Bish. Crim. Proc., secs. 942, 1028–1030; Bisbe v. State, 6 Ohio, 86; Brister v. State, 26 Ala. 107; Maton v. People, 15 Ill. 536; Washington

v. State, 17 Wis. 147; U. S. v. Merchant, 12 Wheat. 480.

By Act January 7, 1876 (Comp. Laws, sec. 1823), the common law was introduced into this territory, if not previously imposed by the organic act, together with such British statutes as were in force on July 4, 1776. Browning v. Browning, 3 N. M. 659.

JOHN P. VICTORY, solicitor general, for the territory.

The control of challenges, and of all the proceedings by which a jury is finally selected, is committed to a wide discretion of the court, and its decision as to the indifference of a juror is final and can not be reviewed, unless gross partiality is shown. State v. Green, 95 N. C. 611; Patterson v. State, 48 N. J. L. 381; Rowell v. R. R., 58 N. H. 514; State v. Knight, 4 Me. 11; State v. Pike, 6 Am. Rep. 533; Reynolds v. U. S. 246; Clawson v. U. S., 477, 488.

The court properly allowed the challenge, for cause, of the juror Baca, the examination on the voir dire showing a relationship existing between his mother and the mother of the wife of defendant. State v. Walton, 74 Mo. 270; Wireback v. Bank, 97 Pa. St. 543. See, also, secs. 974, 976, Comp. Laws; Moody v. Griffin, 65 Ga. 304; Thomp. on Trs., sec. 130.

If the peremptory challenges of the challenger were not exhausted, he can not complain. U. S. v. Neverson, 1 Mack. (D. C.) 152; State v. Hoyt, 47 Conn. 518; Sullings v. Shakespeare, 46 Mich. 408; Minech v. State, 8 Colo. 440; State v. Lawler, 28 Minn. 216; Wilson v. People, 94 Ill. 299; Powers v. State, 23 Tex. App. 42.

"A challenge to the array must be in writing." Thomp. on Trs., sec. 98; Ryder v. People, 38 *Mich.* 269; Suttle v. Baker, 1 Iowa, 141.

Statutes regulating the selection and summoning

of jurors are directory, not mandatory. Thomp. on Trs., secs. 15, 34; Forsythe v. State, 6 Ohio, 20; Colt v. Eves, 12 Conn. 243; State v. Knight, 58 Mo. 556; Crowe v. Dygert, 4 Wend. 675; State v. Pitts, 58 Mo. 556.

A literal compliance with the statute under which jurors are selected is not necessary to the validity of the panel. Maples v. Boyle, 69 Ill. 523; White v. State, 20 Ga. 64; 35 N. Y. 125; 31 How. Pr. 140; 26 La. Ann. 579; 28 Id. 630; 72 Ill. 468.

Challenges to the array, at common law, might be tried, either by the court itself or by such officers or persons as it might appoint, while in this territory they are tried, like all other challenges, by the court; and in such cases the court is always invested with a large discretion. Com. v. Walsh, 124 Mass. 35; State v. Hoyt, 47 Conn. 578; State v. Linde, 54 Iowa, 139; Stephens v. People, 38 Mich. 139; State v. Green, 95 N. C. 611; Zell v. Com., 94 Pa. St. 258; Stayner v. State, 9 Tex. App. 440. See, also, as to selection of talesmen, Thomp. on Trs., sec. 26; Bac. Ab. "Juries," 337; 13 Blatch. 267; 32 La. Ann. 999; 47 Conn. 121; 3 Hawk. (N. C.) 175.

Whether a proper emergency arose for selecting additional jurors was for the court to determine according to the nature and amount of business pending before it. Territory v. Doty, 1 Pinn. (Wis.) 396; Suttle v. Batie, 1 Iowa, 141; Hunt v. Scobre, 6 B. Mon. (Ky.) 469, and they are not summoned for a particular case, but for the business of the court generally. Thomp. on Trs., sec. 26; Bird v. State, 14 Ga. 43; State v. Dale, 8 Ore. 229; U. S. v. Loughberry, 13 Blatch. 267; O'Connor v. State, 9 Fla. 215; 48 Mo. 436; 8 Hun. 477; 1 Pick. 42; 8 Mo. 436.

COLLIER, J.—In the bill of exceptions, made a part of the record in this case, appears the following, occur-

ring on the eighth day of the term of court, at which the trial was had: "Samuel Young was challenged peremptorily by defendants. At this time the regular panel of jurors was exhausted, and there were but eleven jurors in the box. The commission appointed at this term to select the jurors to fill the vacancies in the jury selected by the commission at the last term, for this term, were directed to, and did, select eighteen persons in addition to those necessary for filling the vacancies existing at the time of their appointment. The court now orders the clerk to open the envelope containing the list of eighteen persons selected by the commission, appointed on the first day of this term, and a special venire for the jurors so selected was ordered and issued. To this the defendants objected, which objection was overruled by the court, and to the action of the court in overruling the objection, the defendants, by their counsel, then and there excepted and still except. The sheriff returned the said last mentioned special venire, executed by summoning, as jurors, the eighteen persons named in said venire, the same being the same eighteen persons named in the said list selected by the jury commission on the first day of this November, 1887, term of this court, in addition to the list then selected by them to fill vacancies existing in the petit jury summoned for the November, 1887, term of the court."

The record also shows that, as each of the persons named in said special venire was called and sworn, "defendants objected to his serving as a juror on the ground that he was not summoned in accordance with the requirements of law, and challenged him for cause on that ground, which challenge the court refused to allow," to which defendants "then and there excepted and still except."

By the time nine of these additional persons were called (one of whom was excused by the court for

other reasons and one upon peremptory challenge by the defendants) the court held that the defendants' challenges were exhausted. The remaining seven were challenged collectively for the reasons alleged against each individually, and the challenge being overruled, the trial proceeded with said seven constituting a portion of the jury, which found the defendant guilty of murder in the first degree. The motion for a new trial being made and overruled, the defendant, Patrick Carmody, seeks a reversal and a new trial, because, among other errors of the issuance of said special venire and the overruling of his challenges, as above set forth.

IMPANELING of petit jury when exhausted by challenges: construction of statutes.

In considering these grounds it became necessary to refer at some length to the jury law as it existed at the time of the trial, which occurred at the November, 1887, term of the district court of Socorro county; the reason for this case not being sooner disposed of being that pending appeal defendants broke jail and escaped, the appellant, Patrick Carmody, having been only recently captured and his appeal being now the only one considered, as the other defendants are still at large.

By an act entitled, "An act to amend the law in relation to the selection of jurors," approved February 18, 1887, the judge of the district court was required to appoint at each regular term of court "a commission to select the grand and petit jury, whose duty it shall be to serve at the next regular term of said court in such county." Session Laws of 1887, p. 198, sec. 1.

By section 5 of the same act it is provided, "when there shall be any vacancies in either the grand or petit juries of the district court of any of the counties, talesmen shall be selected from the body of the county for the district court held in any county by four persons appointed by the court * * * to fill such vacancy or vacancies."

Section 5 is an amendment to section 587 of the Compiled Laws which provided that when any such vacancies occurred they should be filled in both juries by summoning talesmen in the same manner as in case where no commission is appointed to select jurors, the law as it stood prior to 1887 provided for a commission to select at one term for the next, and being amended by section 1 of said act only by creating the commission in a different manner.

There is no other provision now, nor was there prior to 1887, for the selection of a grand jury, but as to petit juries we find the following provisions of the Compiled Laws:

"Section 634. When, by reason of challenge or otherwise, a sufficient number of jurors duly drawn and summoned can not be obtained for the trial of any cause, civil or criminal, the court shall cause jurors to be returned from the by-standers or from the county at large to complete the panel.

"Sec. 635. The jurors so returned from the by-standers shall be returned by the sheriff or his deputy, or by any disinterested person appointed therefor by the court.

"Sec. 638. If a sufficient number can not be obtained from the box to form a jury, the court may, as often as is necessary, order the sheriff to summon so many qualified to serve as jurors as it deems sufficient to form a jury; the jurors so summoned must be called from a list returned by the sheriff, and so many of them not excused or discharged as may be necessary to complete the jury must be impaneled and sworn."

It appears, therefore, from the record, that the court finding "vacancies in the jury selected by the commission at the last term" by virtue of section 5 of the Act of 1887 appointed a commission to fill those vacancies, "for this term." Thus far there can be no question of the court being fully within the law. The

record then recites that this commission were directed to, and did, select eighteen persons in addition to those necessary for filling the vacancies existing at the time of their appointment. Let us concede for a moment that so far as this selection goes there is no violation of the law, but then what does it amount to after the vacancies on the jury selected by the commission at the prior term had been filled? For instance, if there were four vacancies on such juries, it could not be contended that the commission, with a view to guard against disqualifications and to provide for excuses, could not select and cause to be summoned a greater number than four. But if more than four were obtained from the number what became of the excess? It is plain that they would be excused by the court because of the regular panel they were summoned for being already full, and not being summoned for any particular case they could occupy no legal relation to the court.

In this case, however, the presiding judge did not retain for duty any excess of jurors summoned to fill vacancies on the regular panel, but he attempted to vest in a commission, authorized by statute to fill vacancies on a regular panel, the power to select names, which the court may place on a special venire as an emergency may present itself. The emergency first presenting itself was an insufficiency in the regular panel for the trial of the particular case of appellant. That emergency might have arisen by vacancies occurring in the regular panel, and if it had, it could with some force be urged, that such a contingency might have been provided against in this manner; but how can it be said, however, that such a commission, whose duty is by statute confined to the filling of vacancies on a panel, can select jurors to try a particular case, when another statute provided that the sheriff should do that by means of an open venire?

If this statute for an open venire had not ever

existed, it would be held, in accordance with the decision in Clawson v. The United States, 114 U. S., that the power of the commission having been exhausted in filling the regular panel, resort would be had to an open venire as at common law. See, also, Brotherton v. State, 17 S. W. Rep. 932. A fortiori is this true with the statute of the territory then in force explicitly requiring an open venire. Secs. 634, 635 and 638, Compiled Laws of N. M.

In McGann v. Hamilton, 19 Atlantic, 376, it was held that where a statute provides the manner of selecting a jury, all other ways are impliedly prohibited. In Virginia in the cases of Jones v. Com., 12 S. E. Rep. 226, and Vawter v. Com., Ibid. 339, a motion in arrest of judgment was sustained, where a list of persons was furnished by the judge, notwithstanding the statutory provision that "no irregularity in any venire facias, or in the drawing, summoning, returning, or impaneling of jurors, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury," it being ruled that there being no venire at all this provision had no application and though there was the semblance of a writ directed to a particular person, it was not an open venire and in effect no venire at all. These cases are exactly in point and this special venire being on its face contrary to law, was in no sense a venire to bring jurors into court, to serve in a particular case.

We hold, therefore, that the jury trying said cause was illegally constituted as to the seven who were brought into court by the alleged special venire, and that the only legal method of completing the panel for the trial of said cause was by summoning by-standers or by an open venire addressed to the sheriff of the county of Socorro, as provided by sections 634, 635 and 638 of the Compiled Laws of New Mexico; that the verdict rendered in said cause should be set aside, and

a new trial awarded, without considering the other assignments of error pressed upon our attention, and it will be therefore so ordered.

HAMILTON and BANTZ, JJ., concur. SMITH, C. J., and LAUGHLIN, J., dissent.

[No. 631. August 6, 1896.]

UNITED STATES OF AMERICA, APPELLEE, v. JOSEPH ROUTLEDGE, APPELLANT.

CRIMINAL LAW—CUTTING TIMBER ON PUBLIC LAND—PROOF—ONUS.—Where, on a trial, on indictment for the unlawful cutting of timber on the public land, the defendant proved that he had a mineral entry on the land, entitling him, under the law, to cut timber therefrom for certain purposes, the presumption was that the cutting done was for such purposes, and the burden was on the prosecution to prove, beyond a reasonable doubt, that it was not for such purposes.

ID.—INSTRUCTION—PREJUDICIAL ERROR.—An instruction, in such case, requiring the jury to determine, as a matter of fact, the question of the ownership or nonownership of the tract of land, which the prosecution admitted to be his land, was prejudicial to defendant.

APPEAL, from a judgment of the First Judicial District Court, convicting defendant of cutting timber on the public lands of the United States. Reversed; LAUGHLIN, J., dissenting.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT for appellant.

If the land was shown to be of the character offered to be shown, the defendant had a perfect right to cut upon it. U. S. v. Saucier, 5 N. M. 569; Act Congress, June 3, 1878 (Supp. Rev. Stat., p. 166); 1 Dec. Dept. of Interior, pp. 697-699.

"In criminal cases the burden is always on the government to prove all its material allegations, and

the burden of proof never shifts to the defendant, unless he sets up some affirmative defense, as alibi, insanity or the like." Coffin v. U. S., 156 U. S. 461; 3 Rice on Ev., p. 424, sec. 259; Comm. v. McKee, 1 Gray (Mass.), 65; Kent v. People, 8 Colo. 572.

The Pecos Pueblo land is not "an Indian reservation or land belonging to or occupied by any tribe of Indians under authority of the United States" as contemplated by the act of congress under which the indictment was found. U. S. v. Santistevan, 1 N. M. 539, 593; 94 U. S. 618, 619.

The instruction of the court in regard to "reasonable doubt," "if you find such a doubt, it is your duty to give it the fullest consideration, but this doubt must arise from the evidence or from the want of it," was fatally erroneous. It should have been, if you find such a doubt, it is your duty to acquit. Chavez v. Territory, 6 N. M. 455; Faulkner v. Territory, Id. 465; 3 Rice on Ev. 432, 434.

J. B. H. HEMINGWAY, United States attorney, for appellee.

The contention of appellant that the court erred in refusing to permit him to prove that the public land, upon which he was charged with cutting timber, was mineral in character, and unfit for agricultural purposes, is not sustained by United States v. Saucier, 5 N. M. 569.

The return made by the surveyor of public lands must stand until the contrary be proved. 8 Copp's Land Owner, 120.

Where mineral lands are included in a reservation, they are not thereafter subject to entry, for any purpose, though preexisting rights can not be divested. 1 Dec. Interior Dep. 552.

"Where the prosecution makes out such a case as would sustain a verdict of guilty, and the defendant

offers evidence, the burden is on him to make out the defense, whatever it may be, that he presents." Whar. Crim. Ev. [9 Ed.], sec. 331.

Not only is the burden of proof, in such case, on the defendant, but his defense, to be effective, must be established "by a preponderance of proof." Whar. Crim. Ev. [9 Ed.], sec. 332.

COLLIER, J.—In this case the indictment alleged in various counts the unlawful cutting of timber on certain legal subdivisions of the public lands of the United States, being based on section 5388 of the Revised Statutes.

The legal subdivisions specified are shown to adjoin or corner with a tract of one hundred and sixty acres of land belonging to defendant, and it is also shown he has a mineral entry upon one of said subdivisions.

While there is testimony going to show that timber was cut or caused to be cut by defendant on these subdivisions, he also produced testimony going to show, that the only timber which was cut in that vicinity by his direction was upon his own land and upon said mineral entry, and that such timber as was cut upon the mineral entry was for mining purposes, the timber cutting being as shown by the government for mercantile uses. The questions presented, therefore, to the jury were: First, whether or not defendant unlawfully cut or caused to be cut timber on the subdivisions other than the mineral entry, and, second, if only on the mineral entry if it was done for mining purposes.

As to the cutting admitted by the defendant to have been done by him on the mineral entry and upon his own land, and which his proof tended to show was the only cutting done by his direction, the court below instructed as follows: "But you are instructed, that

there is a mineral entry here made by the defendant, and under this law he was permitted to cut trees for agricultural, mining, or domestic purposes, and unless by a preponderance of proof he has shown you that he did cut on this mineral entry for such purposes, you will find him guilty under the other proof if beyond a reasonable doubt you believe that he is guilty." "You are instructed, and if you believe from the evidence, that the one hundred and sixty acres in question was the land belonging to the defendant, that he was justified in cutting whatever timber he saw fit from them, but if the timber in question was only cut from that property or under the section which I have given you from the Mineral Laws then you will find him not guilty."

As to the former of these paragraphs it is to be said, that the learned judge was evidently proceeding upon the theory, that the defense set up was of extrinsic matter in the nature of a confession and avoidance, or in other words, that it was an affirmative defense and therefore to be proved by a preponderance of evidence. It is readily seen, that the facts which would constitute a license or authority to cut timber upon public land should be established by a preponderance of proof, but in this case there was no question about defendant having shown that he had a mineral entry, and indeed the court instructed the jury that he did have. A license to cut timber on this mineral entry for certain purposes having been shown, the question of guilt or innocence rested not upon the fact of his cutting timber there, but whether or not the cutting was or not, for the purposes allowed by law. We think that if it is shown that defendant was lawfully on said premises, and that he had a lawful right to cut timber for the purpose for which he was there, then there is a presumption that whatever cutting he did was in further-

CUTTING timber on public lands: proof: onus.

ance of such purpose. The rule the court gave the jury was tantamount to telling them, that notwithstanding the fact that defendant has established his right to cut timber on his mineral entry, yet he must also show by a preponderance of evidence that he has not violated the law by so doing. Apparently the defendant is acting within the law when his mineral entry is admitted to exist, but the court says the act of cutting is presumed to be for other than mining purposes, and he must show by a preponderance of proof that it was not for other purposes. The defendant, though held by the court to be in the position of one setting up an affirmative defense, is required to establish a negative proposition. It may be conceded, that when the prosecution showed that the timber was cut on public land there would be prima facie evidence of unlawful intent, and if the case rested there a verdict of guilty would be justified, but when the defendant showed that he was lawfully on said land and had a right to cut timber for specified purposes, this prima facie showing of unlawful intent would be removed and the burden would be on the prosecution to prove or have proved beyond a reasonable doubt the existence of such unlawful intent. We do not mean to say that rebuttal evidence should necessarily be introduced to establish this unlawful intent, but that the jury should have been instructed, that it must appear from the evidence beyond a reasonable doubt that the license of defendant did not cover such timber cutting as was done on said mineral entry, nor do we here decide that this rule would obtain in a civil action to recover the value of timber unlawfully cut.

As to the second paragraph above quoted of the court's instructions, we think it was, or might reasonably be supposed to have been prejudicial to defendant, as it appears to have required the jury to determine as a matter

INSTRUCTION: prejudicial error.

of fact the question of the ownership or nonownership of the tract of land, which the prosecution admitted to be his property, we finding this admission distinctly set forth on page 74 of the record.

The two paragraphs are also somewhat confusing, but they appear to instruct the jury to inquire whether or not the cutting defendant admitted he did was on his land or the mineral entry, when his testimony was that he cut in both places. The serious objection, however, to these instructions is, the error committed by the court in requiring that defendant should establish by a preponderance of proof the fact that he did not exceed the limit of his license in cutting timber on the mineral entry, we holding that the burden was on the prosecution to establish that he did, and this, too, by evidence beyond a reasonable doubt. The criticism made upon the court's instruction as to reasonable doubt, in saying that the jury should give such doubt "the fullest consideration," may be answered by saying that though such language may be somewhat inapt, the objection is not material in view of the instruction elsewhere that the defendant can only be found guilty, if proved so beyond a reasonable doubt.

Wherefore it is considered that a new trial should be granted and it is accordingly so ordered.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur. LAUGHLIN, J., dissents.

[No. 566. August 7, 1896.]

ADOLPH STRAUSS, PLAINTIFF IN ERROR, v. HERBERT H. SMITH, DEFENDANT IN ERROR.

REPLEVIN—JUSTICE'S COURT—APPEAL, DISMISSAL OF.—The plaintiff in an action of replevin, brought before a justice of the peace, can not, on appeal to the district court, by a dismissal of his appeal, deprive the defendant of his right to a trial as to the value of the property replevied and an assessment of damages for its detention; and it would have been error for the court to have granted such application against defendant's objection.

ERROR, from a judgment for defendant for the value of the property replevied and damages for its detention, to the Fourth Judicial District Court, San Miguel County. Affirmed.

The facts are stated in the opinion of the court.

VEEDER & VEEDER for plaintiff in error.

The right of the party appealing to dismiss his appeal and stop all further proceedings in the case at any time before it is submitted to the jury, which would exist independent of statute, is expressly given by the statutes of this territory. Comp. Laws 1884, sec. 1858; Eden Masee Co. v. Yohe, 55 N. W. Rep. (Neb.) 866; Latham's & Deming's Appeals, 9 Wall. 145; Bacon v. Lawrence, 26 Ill. 53; Atkinson v. Gahan, 28 N. E. Rep. 380.

The court erred in failing to distinguish between dismissing the action and dismissing the appeal. Had plaintiff dismissed his action, then the judgment of the justice would have been vacated, and plaintiff would have failed to prosecute his suit to final judgment within the meaning of section 2369. As the case stands there

are two judgments against plaintiff. If the action of the district court be sustained, plaintiff would be compelled to discharge both judgments. Comp. Laws 1884, sec. 2369.

Nothing being conceded by plaintiff; the rights of defendant in this action were a matter of proof, and not having shown that he was the owner of the property or entitled to the possession of the same, there was nothing upon which to base the verdict, and the judgment thereon, and it should have been set aside. Walthers v. Knutzen, 55 N. W. Rep. 1060.

Upon appeal from the judgment of a justice's court, the district court is governed by the same rules, and the jurisdiction of the justice's court is the jurisdiction of the district court. Comp. Laws 1884, sec. 2393; Garland v. Bartels, 2 N. M. 1.

In actions of replevin the value of the property and damages is the debt or sum claimed or amount in controversy. Garland v. Bartels, supra; Cobbey on Replev., sec. 1246; Fisk v. Wallace, 51 Vt. 418.

The court below seemed to have serious doubt as to its jurisdiction, but finally concluded that there were really two actions, one for the property and one for the damages; and accordingly had defendant remit part of the damages awarded. This construction will not stand. Garland v. Bartels, supra.

W. B. BUNKER for defendant in error.

Section 2395, Compiled Laws 1884, evidently contemplates a judgment in the district court against the appellant and his sureties.

"On an appeal from a justice of the peace to the district court the case is tried de novo on its merits in such court, as a court of original jurisdiction." Archibeque v. Miera, 1 N. M. 160.

"If plaintiff dismiss an appeal on his part, it may be considered as an admission that he has no cause of

action, and that the defendant is entitled to the property." Barruel v. Irwin, 2 N. M. 236, 237.

BANTZ, J.—In August, 1891, plaintiff Strauss brought an action in replevin before a justice of the peace to recover the possession of a horse from the defendant Smith; at the trial before the justice the plaintiff was defeated, and appealed to the district court. In May, 1893, the case having been set for trial, Strauss asked to dismiss his appeal, the defendant objected and demanded a trial as to the value of the property taken by the plaintiff under the writ of replevin and for an assessment of damages for its detention; the court called a jury, the defendant produced his proofs, and the court having instructed the jury to find in his favor for the value of the horse, and the value of the use of the horse up to the day of such trial as damages, a verdict was returned fixing the value of the property at $100, and the damages for the detention at $150, and judgment was rendered against the plaintiff and his sureties on the appeal bond accordingly. Afterward the defendant remitted $50 of the damages. The plaintiff moved to vacate this judgment, and then brought this cause here on writ of error.

It is objected that when the plaintiff in open court dismissed the appeal, then under section 1853, Compiled Laws, the court had no discretion to exercise, but was bound to enter an order of dismissal, and was deprived of jurisdiction to hear and adjudge the value of the property or the damages suffered by the defendant by being deprived of the property seized under the writ. The statute under which the action was brought among other things provides (sec. 2395), that if the plaintiff in a replevin suit before a justice of the peace shall discontinue his suit, or suffer a nonsuit, or if he should otherwise fail to prosecute his suit to final judgment, a jury shall be summoned to assess the value of the

REPLEVIN: justice's court: appeal, dismissal of.

goods replevied, and also adequate damages for the detention of the same, and judgment shall be entered therefor in favor of the defendant. There are also provisions allowing an appeal to the district court, and providing that the same rules shall govern in the district court in such cases as are prescribed for the justice courts.

It will be seen that replevin cases present a double aspect. First, as to the right of the plaintiff if successful; and, second, as to the right of the defendant to a judgment against plaintiff for the value of the property and damages if the plaintiff should fail to prosecute his action. It could not be maintained that the dismissal of the case while pending in the justice court would in any wise preclude the defendant from an assessment of the value and damages; for whatever control the plaintiff may have over his own cause of action, he could not deprive the defendant of his right to recover against the plaintiff. When an appeal is taken, the plaintiff continues to retain the property, and if he dismisses his appeal or dismisses his case, then it seems quite apparent that all he does or can dismiss, unless by consent, is simply his own cause of action, and not the defendant's cross-claim. If it were otherwise the plaintiff, by a wrongful use of judicial process, may take defendant's property in advance of a trial of right, then by an appeal from the justice of the peace he may continue to enjoy a valuable use of the property until the case is reached in the district court, and when the case is called for trial, by a dismissal of his appeal he can deprive the defendant of the recovery of any damages against the sureties in the appeal bond. The machinery of justice is not so completely at the mercy of a litigant. A recent text writer, upon this subject, says: "Where property is taken, replevin differs from all other actions in this respect, that both parties are actors, and as the plaintiff had taken the property from

the possession of the defendant, the law will not permit him to dismiss his action out of court over the objection of defendant." And again: "He (the plaintiff) can not dismiss his suit so as to avoid the hearing as to the value or the damages. When such purpose is apparent, it is the duty of the court to retain the case and hear and determine the question as to the damages, and the return of the property." Cobbey, Replevin, sec. 1193. In Broom v. Fox, 2 Yeates (Pa.), 531, it was said: "Regularly, there can be no discontinuance without leave of the court, and this rule holds with peculiar force in replevins. 1 Leon. 105. There both parties are actors, and yet the avowant can not discontinue. 1 Stra. 112. When goods are delivered to the plaintiff in replevin, the defendant has an evident interest in the suit, being entitled to a writ of retorno habendo, if the issue be found for him." The rule thus arising from the dual nature of replevin proceedings was maintained in numerous cases. Higbee v. McMillen, 18 Kan. 133; Howell v. Foster, 65 Cal. 169; Mikesell v. Chaney, 6 Port. (Ind.) 52; Moore v. Herron, 17 Neb. 697; Marshale v. Bunker, 40 Iowa, 121; Wilkins v. Treynor, 14 Iowa, 393; Altman v. Reams, 9 Neb. 487; Ahlman v. Meyer, 19 Neb. 63; Maxey v. White, 53 Miss. 80. In Boutele v. Warne, 62 Mo. 350, it was held that the replevin statutes were intended to permit a complete adjustment of all the rights of the parties in one action. See Singer Manufacturing Co. v. Senn, 7 Mo. App. 585.

If the plaintiff could not deprive the defendant of this substantial right by a dismissal of his cause, he can not do so by merely dismissing his appeal. In Soper v. Hawkins, 56 Mich. 527, the plaintiff dismissed his appeal against the objection of the defendant, who demanded an assessment of damages, and the supreme court reversed the court below for refusing to assess the damages. The appellant can not, by applying to

the court to dismiss his appeal, relieve his sureties on the appeal bond; and the court could not grant such an application, against the defendant's objection, and thus destroy the security provided by the statute for the benefit of the appellee. There is no error in the record, and the judgment will, therefore, be affirmed.

SMITH, C. J., and LAUGHLIN, COLLIER, and HAMILTON, JJ., concur.

[No. 653. August 18, 1896.]

W. A. MAXWELL, RECEIVER, PLAINTIFF IN ERROR, v. JAMES W. TUFTS, DEFENDANT IN ERROR.

CONDITIONAL SALE OF PERSONAL PROPERTY—TITLE—UNRECORDED CONTRACT—REPLEVIN.—A contract for the sale of personal property conditional upon the title remaining in the vendor until the payment of the purchase price, is not within the recording act of 1889 (Session Acts, 1889, ch. 73, sec. 1); and the vendor, out of whom the title to the property does not pass until the performance of the condition precedent, may maintain an action of replevin for its recovery as against the claim of an attaching creditor of the vendee, although the instrument be unrecorded.

ID.—TENDER—APPELLATE PRACTICE.—In such case, where a stipulation upon which the case was tried did not disclose whether or not plaintiff had tendered the return of the notes given for the deferred payments of the purchase money, the point that he could not maintain his action until he had done so, could not be raised, by the defendant and plaintiff in error, for the first time in the appellate court.

ERROR, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

CHILDERS & DOBSON for plaintiff in error.

"Where the transaction between the parties is in reality and in its legal effect a contract of sale, conditional upon the payment of the purchase price in suc-

cessive installments, it can not be modified, nor its legal effects avoided by the fact that they speak of it as a 'lease' and call the installments 'rent.'" 3 Am. and Eng. Ency. Law, 426, and note 5. See, also, Hervey v. Locomotive Works, 93 U. S. 664, citing McCormack v. Hadden, 37 Ill. 370; Ketchum v. Watson, 24 Id. 591; Heryford v. Davis, 102 U. S. 255.

Where statutes have been adopted from foreign countries or other states, the decisions construing them are considered as part of the statutes as adopted. Coulam v. Doull, 133 U. S. 216; 23 Am. and Eng. Ency. Law, 433, and citations.

Such a contract gives a lien upon the property for the purchase money. Gregory v. Morris, 96 U. S. 619. See, also, Webber v. Safe & Lock Co., 29 Pac. Rep. 747; George v. Tufts, 5 Colo. 162.

JOHNSTON & FINICAL for defendant in error.

The distinction between a conditional sale and an absolute sale with a mortgage back to the vendor is well known and recognized in common law, and by the courts of last resort of this country. Harkness v. Russell, 118 U. S. 663; Land & C. Co. v. Motor Co., 12 S. Rep. (Ala.) 768; Iron Works v. Smith, 13 Id. 525; Iron Works v. Richardson, 18 S. W. Rep. (Ark.) 381; Dist. Co. v. Shannon, 29 Id. 147; Machine Works v. Long, 31 Atl. Rep. (N. H.) 20; Keck v. Cash Register Co., 39 N. E. Rep. (Ind.) 899; Dodd v. Bowles, 19 Pac. Rep. (Wash.) 156; De St. Germain v. Wind, 13 Id. 753; Petty Place v. Bridge & Mfg. Co., 61 N. W. Rep. (Mich.) 266; Tufts v. D'Arcambal, 48 Id. 497; Campbell Print. Press v. Malker, 1 S. Rep. (Fla.) 59; Fur Co. v. Cram, 28 Atl. Rep. (Conn.) 540; Mask v. Allen, 17 S. Rep. (Miss.) 82; Schneider v. Lee, 17 Pac. Rep. (Ore.) 269; Sanders v. Keeber, 28 Ohio St. 630; Stand. I. Co. v. Parlin, Pac. Rep. (Kan.) 360; Tufts v. Cleveland, 3 S. W. Rep. (Tex.) 288.

BANTZ, J.—This is an action in replevin, brought to recover possession of a soda fountain and apparatus. The cause was tried before the court without a jury, upon a stipulation as to the facts. Burgess & Son gave their notes, and acquired the property from Tufts under what is usually described as a "conditional sale." The controlling clause is as follows: "It is understood and agreed by and between us and the said James W. Tufts that the title to the above mentioned property does not pass to us, and that until all said notes are paid the title to the aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law to enter and retake immediate possession of the said property, wherever it may be, and remove the same." The contract was not filed or recorded in the recorder's office. The Bank of Commerce brought suit by attachment against Burgess & Son, and levied it upon the chattels in question. Eight of the installment notes having become due and remaining unpaid, Tufts, after demanding possession of the property, brought this action in replevin. The court below found in favor of the plaintiff, and the defendant, Maxwell, who held as receiver in the attachment case, brought this case here by writ of error.

The question is as to whether the vendor of an unrecorded conditional sale of chattels has a superior title to an attaching creditor of the vendee.

CONDITIONAL sale of personal property: title: unrecorded contract: replevin.

It early became the settled law that a mortgage of chattels which were allowed to continue in the possession of the mortgagor did not thereby become fraudulent, as against the purchasers or creditors of the mortgagor. Unlike the absolute sales of chattels where the vendor remained in possession, there was nothing inconsistent in the possession of the mortgagor, with the defeasible title in the mortgagee, and therefore nothing implying

a secret use. Twyne's Case, 1 Smith, Lead. Cas., and notes; Edwards v. Harben, 1 Term R. 587; Conard v. Insurance Co., Pet. 388, 449. But the difficulty of proving actual fraud, or the falsity of such secret transactions, furnished a cover so convenient to fraud and perjury that the legislatures quite generally provided that such mortgages should be invalid, as against purchasers and creditors, unless the mortgagee took possession of the chattels, or recorded the mortgage in the public registry of deeds. These recording acts, requiring chattel mortgages to be recorded, were held, however, not to apply to sales conditional upon the payment of the purchase price by the vendee. In Redewill v. Gillen, 4 N. M. (Gil.) 72, this court passed upon these general questions, and held that the conditional sale of chattels did not fall within the act then in force, requiring chattel mortgages to be filed in the recorder's office, and that such vendor could assert his rights against creditors or purchasers of the vendee. Since then the act of 1889 was passed, which amended the old law so as to read as follows: "All chattel mortgages or other instruments of writing having the effect of a mortgage or a lien upon personal property shall be acknowledged by the owner or mortgagor and recorded in the same manner as conveyances affecting real estate." Acts 1889, c. 73, sec. 1. It was contended by the plaintiff in error that the instrument evidencing the transfer from Tufts to Burgess & Son was an instrument "having the effect" of a "lien," within the meaning of this act. Where, by the terms of the contract, the title is to remain in the vendor until the payment of the purchase price, something more than a mere lien is reserved. The title does not pass out of him until the condition precedent has been performed. The transaction is not strictly a sale, but a contract for a sale. Everett v. Hall, 67 Me. 497; 1 Benj. Sales [4 Am. Ed.], sec. 366; Harkness v. Rus-

sell, 118 U. S. 663, 7 Sup. Ct. 51. Following this view, it has been held that the vendor's title is subject to execution (Everett v. Hall, 67 Me. 497); that the increase which occurs pending the performance of the conditions belongs to the vendor, though if the transaction were merely a pledge it would belong to the pledgee (Allen v. Delano, 55 Me. 113; Clark v. Hayward, 51 Vt. 14; Buckmaster v. Smith, 22 Vt. 203); and that such property is not liable for rent to the landlord of the vendee (Bean v. Edge, 84 N. Y. 510). In some of the states, as in Missouri and Ohio, it has been deemed necessary to provide by statute for the protection of the vendee against forfeiture of such payments as have been made by him, when for subsequent defaults the vendor asserts his right to retake possession. These matters, however, are only mentioned by way of illustration and do not enter into the decision of this case. In Colorado, following the Illinois decisions, it has been held that the right of the vendor is in the nature of a lien, within the meaning of a recording act like ours. But the force of these authorities has been very greatly shaken by the recent case of Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51. In Texas, where the statute is also like our own, it is held not to apply to conditional sales. Tufts v. Cleveland 3 S. W. Rep. (Tex. Sup.), 288. See, also, Pettyplace v. Groton Bridge, 61 N. W. Rep. (Mich.) 266; Tufts v. D'Arcambal, 48 N. W. Rep. (Mich.) 497; Schneider v. Lee, 17 Pac. Rep. (Or.) 269; Sanders v. Keber, 28 Ohio St. 630; Insurance Co. v. Parlin, 33 Pac. Rep. (Kan. Sup.) 360; Tufts v. Thompson, 22 Mo. App. 564. We are of the opinion that the vendor does not hold a mere lien, where by the express terms of the contract the title does not pass to the vendee until the purchase price of the chattel is paid, and that such a sale is not within the recording act above mentioned.

Upon the argument the plaintiff in error raised the

point that, before the plaintiff below could maintain his replevin, it was necessary for him to tender the return of the notes given for the deferred installments of the purchase money; citing Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687. But the case was tried below upon a stipulation which purported to contain a recital of "all the facts material or necessary to the determination" of the case, except as to the value of the property, and damages for its detention. The stipulation does not disclose whether the tender was made or not, and the point now seems to have been raised for the first time in this court at the argument. The assignment of error embraces two specific grounds, namely: (1) That the title passed to Burgess & Son; and (2) that the conditional sale was not recorded. The assignment of error does not include the question now raised, and it can not, therefore, be considered. The judgment must be affirmed.

HAMILTON and LAUGHLIN, JJ., concur.

[No. 660. August 18, 1896.]

UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR v. ALONSO M. SWAN ET AL., DEFENDANTS IN ERROR.

POSTMASTER—SUIT ON OFFICIAL BOND—CLAIMS FOR CREDIT—In a suit on the official bond of a postmaster for a breach of the bond on account of a shortage in his accounts, claims for credit were properly allowed, although, on the prior presentation thereof to the auditor of the treasury, no voucher had been presented, where the only possible voucher for money taken charge of by the postoffice inspectors was a receipt they had given the postmaster therefor, but afterward carried away, and where the voucher for money the postmaster had sent to the depository of the office was an acknowledgment of receipt and a certificate of deposit, required to be given, but not issued, by the depositary.

ID.—REMITTANCE OF POSTAL FUNDS TO DEPOSITARY BY REGISTERED PACKAGE—LIABILITY OF REMITTING POSTMASTER FOR LOSS.—In such action, a recovery could not be had against the postmaster for money, which in the discharge of his official duty, he had remitted by registered package to the depository of his office, though the package containing the money was stolen from the depository before being opened, and though the postal regulations provide that such postmaster shall not take credit, in his cash book or weekly statement, for money sent by him, until he has received the certificate of deposit.

ERROR, from a judgment for defendants, to the Second Judicial District Court. Affirmed.

The facts are stated in the opinion of the court.

GEORGE P. MONEY, assistant United States attorney, for United States.

A claim which has not been presented to the accounting officers of the treasury and disallowed can not be given in evidence notwithstanding its apparent equity. Railroad v. U. S., 101 U. S. 543; Halliburton v. U. S., 13 Wall. 63.

The claim must have been made out with the proper vouchers and account, and presented to the department, and if disallowed because of absence of such account and vouchers, it can not be used as a set-off. U. S. v. Lamon, 3 MacArth. 204, and vouchers as shown by the duly certified transcript are the only evidence. U. S. v. Hart, 19 Pac. Rep. 5; U. S. v. Gilmore, 7 Wall. 491; U. S. v. Smith, 1 Bond (C. C.) 175. See, also, U. S. v. Lent, 1 Paine, 421; Watkins v. U. S., 9 Wall. 759; U. S. v. Austin, 2 Cliff. 325; U. S. v. Duval, Gilpin, 356; U. S. v. Barker, 1 Paine, 146; U. S. v. Giles, 9 Cranch, 212; Ware v. U. S., 4 Wall. 617; U. S. v. Davis, Deady, 294.

Even if it were contended that the claim was an equitable set-off, it could not be proven save that it had been duly presented to the accounting officers of the treasury, with the necessary vouchers, as required by

the statutes. U. S. v. McDaniel, 7 Pet. 1; Giles v. U. S., 9 Cranch, 236; Murfree on Official Bonds, sec. 294.

The defendants were insurers of the remittances until they were credited to the defendant Swan upon the books of the depository postoffice where the instructions required the deposits to be made. Reg. 1404, 1405; Boyden v. U. S., 13 Wall. 17, 25; The Harriman, 9 Id. 161; Muzzy v. Shattuck, 1 Denio, 233; Comm. v. Comley, 3 Pa. St. 372; State v. Harper, 60 Ohio St. 67; U. S. v. Prescott, 3 How. 578; U. S. v. Dashiell, 4 Wall. 182; U. S. v. Keehler, 9 Id. 93; Comm'rs v. Lineberger, 35 Am. Rep. 462.

E. W. DOBSON for defendants in error.

The evidence offered by defendants in support of their set-off was legal and admissible. It has been almost universally held that the disallowance of a claim by an auditing officer is not final and conclusive, at least as far as the defendant is concerned. U. S. v. Hart, 19 Pac. Rep. 4; U. S. v. Gaussen, 19 Wall. 198; U. S. v. Eckford, 6 Id. 484; U. S. v. Wilkins, 6 Wheat. 138; Bruce v. U. S., 17 How. 437.

BANTZ, J.—This is an action upon the bond of a postmaster. The contest arises over two items upon which the United States was defeated in the court below. One of these items was for $250 which the principal, the postmaster at Gallup, was charged with the duty of remitting to the designated depository at Albuquerque; the other was for $82 which the principal claimed to have paid to the postoffice inspectors when they took charge of the postoffice at Gallup. The defendants introduced testimony tending to show that Swan, the principal (and the postmaster at Gallup), sent the $250 in a registered package to the postmaster at Albuquerque, the designated depository for the Gallup office; that the registered package was duly

received by the Albuquerque postmaster, who opened the package and took therefrom the envelope said to contain the money and put the envelope in his safe. The postal regulations require the depositary to acknowledge the receipt of the money and send a certificate of deposit to the remitting postmaster, and unless such acknowledgment is received in "due time," it shall be the duty of the remitting postmaster to notify the nearest inspector, and the superintendent of the money order system. The Albuquerque postmaster did not acknowledge the receipt of the money or send the certificate of deposit, but wrote acknowledging the receipt of the package and explaining that the office had been entered and the contents of the safe carried away. Postoffice inspectors afterward visited the Gallup office and after an examination took charge of $82 found by them to belong to the United States giving Swan a receipt therefor and afterward took charge of the office, but by accident it is supposed carried away the receipt which they had given to Swan. It was also shown that an affidavit made by Swan, setting out the items of the account and dates and detailing the facts was sent to the sixth auditor of the treasury; subsequently the auditor returned the affidavit and account, and in the accompanying letter observes "that a careful examination shows that there is no evidence in this office as to either of alleged payments referred to, or that he is entitled to any further credits on his accounts." Upon the introduction of this affidavit and the letter from the auditor, the counsel for the United States said: "This is not in the form the statute requires, but I make no objection to that." At the conclusion of the testimony the counsel for the United States said: "Now I propose to confine myself to the $250, and I move to exclude the papers which were offered here as evidence of the demands recently made by the defendant on the presentation

of his claim to the auditor for the postoffice department; I move to exclude the evidence of that presentation on the ground that it does not show that any vouchers were presented * * * and I move to exclude that and all of the testimony relating to the $250, credit claimed on the ground that it was not a credit to which the defendant was entitled under any circumstances," even if the proper presentation and disallowance had been shown in proper form, it is not a claim which the law recognizes as just or legal. Counsel for the defendant:—"I understand the gentleman to admit that that affidavit was returned to the defendant here with that letter attached." Counsel for the United States:—"I admit that that is not the point I make at all. As I stated this morning, I did not regard that as proper evidence because the statute requires that it shall be a transcript certified, and we had only the letter, but I make no point as to that, but the objection I make is that the copy of the demand and the letter with it do not show any such vouchers were presented to the auditor as the law contemplates;" and second, that even if properly presented, it is not a just and legal credit at all. The jury under the directions of the court allowed both of these credits.

It is true that in order to guard against surprises which the government might not be able to meet or explain in the hurry of a trial, it may rightfully require that such claims for credit as these should be submitted to accounting officers of the United States, precedently to the submission of them to a trial in court. Such a regulation is reasonable and is consistent with sound public policy. "It eliminates from the judicial proceedings all uncontested claims, secures the public accounts from confusion and uncertainty, and still leaves the defendant at full liberty to establish, if he can by legal proof, such

POSTMASTER: suit on official bond: claims for credit.

claims as the official accountant has felt it his duty to reject. The rejection of such claims by the accounting officers justifies no presumption against them, * * * consequently the courts refuse to admit as a matter of defense, in actions on official bonds, all evidence of claims, payments or set-offs which have not been tried and found wanting by the proper accounting officers." Murfree Official Bonds, sec. 294. The rejection of any claim in whole or in part, is not, however, of any binding force as to its legality. Salazar v. Territory, 8 N. M. 1; U. S. v. Barker, C. C. 175. "There may be many instances in which its operations may savor of harshness, or even of injustice, but there can be no doubt that such a provision is necessary to prevent the presentation of fraudulent or fictitious claims upon the government." U. S. v. Smith, 1 Bond C. C. 70. If the government had objected to the testimony in this case on the ground that the proof of the presentation to and disallowance by the auditor was insufficient, it must, perhaps, have been allowed; but the record shows that the objection was waived as to form of the presentation and disallowance. The objection was specifically based upon two grounds, viz.: (1) that no vouchers were filed in support of the claim and (2) that the subject-matter itself constituted no legal ground of claim for credit. As to the first of these grounds it was conceded at the argument the only voucher which could have been presented to the auditor in support of the $82 was the one which it is claimed the inspectors carried off; and that the only voucher for the support of the $250 was the acknowledgment of the receipt of the money, or the certificate of deposit which the postmaster at Albuquerque never in fact issued. Neither of these vouchers could have been sent to the auditor by Swan, and it seems to us that no more than oral proof was obtainable under the circumstances. In this case an itemized account was pre-

sented, and we think sufficient excuse was shown for not supporting it with vouchers. We will now consider the second ground of the objection, which is the one addressed to the merits of the claim, and seems to be the one principally relied upon, namely, that the claim for credit as to the $250 lacked legal sufficiency in itself. It is claimed that Swan became the insurer against loss of the money sent by him to the Albuquerque postmaster, until the latter sent to him a certificate of deposit for the same, and that even though the Albuquerque postmaster actually received the money and then lost or misappropriated it, Swan and his sureties would be liable for it on this bond, unless Swan secured the certificate of deposit.

REMITTANCE to depositary by registered package: liability of postmaster for loss.

It is true that the principal and sureties are bound by their contract, and if the terms of liability are general, they must provide for such exceptions as may be desired, otherwise the hardship of the loss can not diminish the generality of the promise. Paradine v. Jane, Aleyn, 26; Atkinson v. Ritchie, 10 East, 530; Davis v. Smith, 15 Mo. 468; Bish. Contr., sec. 591. But in the construction of the contract as to the duty required, the supreme court of the United States, in a recent case, while laying down this general principle, says: "But, where the event is of such character that it can not be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by the general words, which though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Chicago R'y v. Hoyt, 149 U. S. 1. The common and fundamental principle which is always applied in determining the extent of the liabilities of sureties is, that their obligation must be strictly construed; nothing is to be taken by inference or implication against them.

Turning now to the conditions of the bond we find that, "if the said Alonzo W. Swan shall faithfully discharge all duties and trusts imposed upon him, either by law or the rules and regulations of the postoffice department of the United States; and shall also perform all duties and obligations imposed upon or required of him by law or the rules and regulations of the said department in connection with the money order business," then the obligation was to become void. The postal regulations (1377, 1379 and 1395), it is true, enter into his contract, but they were mere directions, or "instructions" as to the details, promoting the orderly and safe transmission of the funds. Whether a liability would arise upon the bond of him whose disobedience of such regulations caused loss of the funds, it is not necessary to determine. But there is nothing indicating the responsibility of insurer of the funds on the part of the remitting postmaster. The regulation, it is true, provides that such postmaster shall not take credit, for the money sent by him, in his cashbook or weekly statement, until he has received the certificate of deposit, but such a provision, while securing the orderly keeping and rendering of accounts, does not assume to cast a loss which may happen upon one not delinquent. If the money was actually received by the Albuquerque depositary, the certificate would be merely evidence of that fact, but not the only evidence. Nothing but the clearest language could be held to impose a liability upon the remitting postmaster for losses arising from the neglect or misconduct of the depositary after the reception of the funds by the latter. The difficulty of fixing blame where defenses against losses are supported by perjury, it may be, may, of course, involve an occasional loss to the government, but no system is or can be perfect. The bond sued on is answerable for the faithful and the honest discharge of duty by Swan, but of the faithfulness or honesty of no one else. There

is no error in the record and the judgment of the court below will be affirmed.

SMITH, C. J., and HAMILTON and LAUGHLIN, JJ., concur.

[No. 651. August 21, 1897.]

ANDREW B. LAIRD, SHERIFF, PLAINTIFF IN ERROR, v. ELIZABETH C. UPTON ET AL., DEFENDANTS IN ERROR.

1. PRACTICE, APPELLATE—EXCEPTIONS MUST BE TAKEN, WHEN.—The appellate court will not consider errors committed in the trial of causes at law, not excepted to in the trial court at the time the ruling was made.

2. REPLEVIN—HUSBAND AND WIFE—COMMUNITY PROPERTY—EVIDENCE. In an action of replevin by the wife for the recovery of certain goats levied on by execution on a judgment against the husband, where plaintiff's evidence showed that the property was identified, that it was purchased by the husband as the agent of the wife, and that the balance of the purchase money was secured by mortgage on other property belonging to her, an objection that there was nothing in the evidence to show that the property was not community property, and that the presumption was that all acquisitions during the marriage were such property, was without merit.

3. REPLEVIN—FAILURE TO GIVE BOND PRIOR TO ISSUANCE OF WRIT—PLEA TO MERITS—JURISDICTION.—NOR was there any merit in the contention that such action should be dismissed for failure to give a replevin bond prior to the issuance of the writ, as being jurisdictional, where there was an appearance and pleading to the merits. Such objection should have been taken advantage of by proper motion before the pleading to the merits.

ERROR, from a judgment for plaintiffs, to Third Judicial District Court, Grant County. Affirmed.

The facts are stated in the opinion of the court.

W. B. CHILDERS for plaintiff in error.

The value of property or damage for wrongful taking is not tried in this action. Trover and trespass

are the proper actions in such cases. Comp. Laws 1884, secs. 1974, 1981; Wells on Replevin, sec. 31, note, and secs. 33, 38; 20 Am. and Eng. Ency. of Law, 1044, 1045; St. Martin v. Desnoyer, 1 Minn. 41. See, also, Wells on Replevin, sec. 513; Johnson v. Weedman, 1 Scam. 495; Wells on Replev., sec. 297.

A replevin bond is jurisdictional, the writ can not be executed in ordinary cases until the bond has been given. In suits against the sheriff, where the writ runs to a special officer, as under our statutes, the writ can not issue until the bond is given. Comp. Laws, 1884, sec. 1978; Acts 1887, chap. 63, p. 215, sec. 2. See, also, Wells on Replev., secs. 388, 392; Smith v. McFall, 18 Wend. 521; Creamer v. Ford, 1 Heisk (Tenn.), 307; Hannum v. Norris, 21 Kan. 114; 20 Am. and Eng. Ency. of Law, 1088; Catterlin v. Mitchell, 89 Am. Dec. 501; Wells on Replev., sec. 651, and citations.

The justice of the peace statute is mandatory as to the affidavit. Barruel v. Irwin, 2 N. M. 222. See, also, Butts v. Woods, 4 N. M. (Gil.) 343; Elsberg v. Frietze, 43 Pac. Rep. (N. M.) 690; 20 Am. and Eng. Ency. of Law, 1081, and citations; Millilsen v. Selye, 6 Hill, 623; Berrien v. Westervelt, 12 Wend. 194.

The court should have instructed the jury to find for defendant on the evidence. The plaintiff alleged title, and the onus was on her to prove it. Morgner v. Biggs, 46 Mo. 65; Gray v. Parker, 38 Id. 160; Wells on Replev., sec. 120; Hatch v. Fowler, 28 Mich. 205. See, also, Comp. Laws, sec. 64; 23 Am. and Eng. Ency. of Law, 154, and citations, as to violation of statute.

There is nothing in the evidence to show that the goats were not community property. Acts 1889, p. 213, sec. 21, par. 2. See, also, Platt's Prop. Rights, Married Women, p. 6, sec. 7; Ball. on Community Prop., secs. 114–118.

The presumption obtained that all acquisitions

during marriage became common property. Platt's Prop. Rights, Married Women, supra; Ball. on Community Prop., secs. 119, 123.

JAMES S. FIELDER and FRANK J. WRIGHT for defendants in error.

The motion to dismiss should have been filed before pleading to the merits. Comp. Laws, sec. 1913; Steph. on Pl., pp. 83, 373, 378.

This court will presume that a proper bond was given, and approved by the clerk, before the issuance of the writ of replevin. Story v. Hussey, 32 Me. 579; note 4, 20 Am. and Eng. Ency. of Law, 1088.

As to the right of defendant to subject the goats to the payment of a debt due from James N. Upton on the ground that they were community property and liable for the common debts, it is not believed that the act of 1889 repeals section 1087, Compiled Laws.

COLLIER, J.—This is an action in replevin begun in the district court of Grant county, by Elizabeth C. Upton and her husband James N. Upton, joining with her, against Andrew B. Laird, sheriff of the county of Grant, to recover seven hundred and fifty-one head of goats, which had been levied upon by said sheriff, by virtue of an execution issued on a judgment recovered in said court against said James N. Upton, the goats being levied upon as his property. The replevin suit was begun in August, 1894, and filed with the declaration in the cause was the affidavit required by our statute, but the record fails to show that any bond was filed in the office of the clerk of said court, either prior or subsequent to the issuance of the writ, which bears date August 8, 1894, and was returnable to the November, 1894, term of said court. The oath of the special officer appointed to serve said writ was filed on the day following the issuance of said writ. On the tenth day

of the said term the defendant filed a plea of general issue; and a year later at the November, 1895, term of said court, there was filed a motion to dismiss said cause for want of proper service and return. The record does not show what disposition was made of said motion; but eight days later an affidavit of James N. Upton was filed in the cause to the effect that a replevin bond was executed "prior to the issuance and levy of the writ," and that the bond "was accepted by the officer who levied the writ," and on the next day a bond to take the place of the one so alleged to have been given was "approved as to form and sufficiency of sureties" by the clerk and filed in his office. The cause then proceeded to trial, resulting in a verdict, as follows: "We, the jury, find verdict for the plaintiff and assess the damages at $500."

There was a motion at the close of plaintiff's evidence for "the court to instruct the jury to return a verdict for the defendant," and being overruled, and the overruling excepted to, evidence in defense and in rebuttal was gone into. On the twenty-ninth day of November, 1895, motion in arrest of judgment was made, upon the grounds that there was not proper and sufficient service of the writ, and that plaintiff, being a married woman, had not joined her husband in the action; and a motion for a new trial also upon the grounds that the verdict is contrary to law and the evidence, and for error in overruling defendant's motion to direct a verdict. These motions were each overruled. The bill of exceptions fails to show an exception to the instructions of the court, or to the overruling of the motion in arrest of judgment, and for a new trial. It is abundantly established by authority that appellate courts, unless there are statutory provisions securing review without exception duly taken, will not consider errors committed in the trial of cases at law, which were not ex-

PRACTICE, appellate: exceptions.

cepted to in the trial court. This court, it has recently been held by the supreme court of the United States, in the case of Grayson v. Lynch, decided May 26, 1896, has no statutory provisions which take it out of the rule of being upon a writ of error "limited to the bill of exceptions or questions of law otherwise presented by the record." In Grayson v. Lynch, supra, it is stated that "there is clearly nothing in these (our) statutes which lays down a different rule from that ordinarily pursued in appellate courts," and that "only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions." This conclusion was arrived at by a construction of our statutes as they existed prior to section 4 of the act of 1889, entitled "an act with reference to practice in the supreme court and for other purposes," and as to this section the court in Grayson v. Lynch, supra, say "it is difficult to perceive wherein this statute makes any essential change in the previous practice. * * * It certainly does not in term require that the court shall rehear the case upon the testimony, as if it were an appeal in equity, but limits its powers of review to such questions as are apparent upon the record, or incorporated in the bill of exceptions."

As to what a bill of exceptions may properly contain our statute prescribes in section 2197, Compiled Laws, which reads as follows: "Sec. 2197. Exceptions to the decision of the court upon any matter of law arising during the progress of a cause, or to the giving or refusing of instructions, must be taken at the time of the decision. In equity causes no exception shall be required."

We take it that the words, "during the progress of the cause" mean during the steps taken from the beginning of the trial to its final disposition in the trial court, up and to including said final disposition, our statute requires to be excepted to at the time they

are made, and should be incorporated in the bill of exceptions.

This supreme court has construed this section in Territory v. O'Donnell, 4 N. M. 196, and the learned justice delivering the opinion has shown by a mass of authority that section 2197 is but declaratory of the true rule, that exception must be taken at the time the ruling is made.

In the bill of exceptions in this case it does not appear that the overruling of the motions in arrest of judgment and for a new trial was excepted to.

The overruling of the motion to instruct the jury was excepted to at the time, but if it is true that it is necessary to move for a new trial before exceptions, though duly taken, can be considered in this court, it would seem to follow as is held in Kernodle v. Gibson, 114 Ind. 451, that matters which are properly causes for a new trial should be embraced in the motion therefor. We cite, also, to this, State v. Nelson, 101 Mo. 477, these two cases being directly in point, and many more to like effect we believe could be found.

As, however, the exception to the overruling of the motion to instruct for the defendant was not, in our judgment, error, it is unnecessary to decide in this case the effect of failure to except to the overruling of the motion for a new trial. Plaintiff's evidence showed that the goats sued for were identified; that the husband purchased same as his wife's agent; that her money paid for them in part; that the balance of purchase money was secured by mortgage on other property belonging to her, and that damages for detention were suffered. As militating against the sufficiency of proof to sustain the verdict, it being shown that the property was levied on by execution on a judgment against the husband, it has been pressed upon us that there is nothing in the evidence to show that this was

REPLEVIN: husband and wife: community property: evidence.

not community property, and that the presumption obtains that all acquisitions during marriage are such property. If it were conceded that this property was acquired during marriage, as to which there is nothing but vague inference to show, it yet does not appear that the claim for which judgment was rendered was a "common debt of the marriage." We know not its origin or nature, whether founded in tort or on contract, or whether it preceded the marriage relation or came after it. Certainly presumptions should not establish its character as a charge upon acquest property. We therefore hold this exception without merit.

This leaves us to the consideration only of such assignments of error as are apparent upon the record. These relate to the failure to give a replevin bond prior to the issuance of the writ, it being claimed that, notwithstanding there was appearance and pleading to the merits, the cause should be dismissed, because such failure was jurisdictional. It is admitted that if the giving of the bond was to be subsequent to the issuance of the writ, but before its service, this position would be untenable, though the writ might be dismissed upon motion if bond were not furnished. It is claimed, however, that the bond, being like the affidavit, a condition precedent to the issuance of the writ, the writ is a nullity if issued without either. The authorities we believe to be variant on this question, but whatever might be the weight in favor of the contention, that the giving of the bond is jurisdictional, we yet would hold that under our statute the contrary is the case, and that it is a matter which should be taken advantage of by proper motion in the case, seasonably taken.

REPLEVIN: failure to give bond prior to issuance of writ: plea to merits: jurisdiction.

Our statute as to writs of replevin does not require the giving of bond prior to the issuance of the writ, except the action be against a sheriff. Secs. 1977, 1978, Compiled Laws of N. M.

The policy of our laws being thus declared, that the giving of a bond in replevin is not jurisdictional, the intent of the legislature must be looked to, declaring that, in a particular class of cases, the bond shall be given at another time, and to a different officer; that is the rule in replevin cases.

The statute changing the rule in cases against the sheriff provides that the clerk shall designate some person to serve the writ, requiring bond before the writ issues. This, in view of the policy of our law, that the giving of the bond is not jurisdictional, should be construed as meaning that the writ should not be executed until the bond is given, and that all the preliminaries to the execution of the writ must be seen to by the clerk instead of by the sheriff, as in all other cases.

In deciding that, we should be governed by the policy of our law, in respect to the giving of bond not being jurisdictional, we do not go quite as far as did the court in Vaiden v. Bell, decided in 3 Rand. (Va.) 448, where, notwithstanding that the Virginia statute required the bond to be given before the issuance of the writ, it was held that inasmuch as at common law no pledges were required before the emanation of the writ, the objection that bond was not given in due time does not go to the destruction of the writ. If this conclusion could be arrived at by the Virginia court in reference to a general law, and when the argument is on the policy of the common law, a fortiori is it true that the policy of our own law should be followed as to an exceptional statute providing for a particular class of cases.

Finding no error for reversal in this cause, it will be ordered that the judgment of the lower court be affirmed.

SMITH, C. J., and LAUGHLIN, J., concur.

[No. 658. August 26, 1896.]

ULYSSES T. CURRAN, PLAINTIFF IN ERROR, v. THE WILLIAM KENDALL BOOT & SHOE COMPANY, DEFENDANT IN ERROR.

ABATEMENT—PLEA TO MERITS—ABANDONMENT.—By pleading to the merits defendant abandoned his pleas in abatement.

ID.—JOINT OBLIGATION—NONJOINDER OF CO-OBLIGOR—DEMURRER.—A demurrer to a plea in abatement to an action against one of two persons, on the ground that the obligation was joint, and the co-obligor was not joined, was properly sustained, under section 1846, Compiled Laws, providing that, in all cases of joint obligations of co-partners and others, suits may be brought against any one or more of those liable.

ID.—ACTION AGAINST SINGLE PARTNER—DEMURRER.—So was a demurrer to a plea in abatement to an action against a single partner, on the ground that his copartner was not joined, properly sustained, under section 1886, Compiled Laws, providing that suit may be brought by or against a partnership as such or against all or either of the individual members. The fact that defendant was sued as C., under the firm name of O. J. & Co., amounted to nothing more than a descriptio personae.

ATTACHMENT—NONRESIDENCY—TRAVERSE—DEMURRER.—Where the defendant filed a traverse of the attachment in a suit on a joint obligation, alleging the residence in the territory of one of the partners, not joined as defendant, but not denying the nonresidence of defendant, the sustaining of a demurrer to the traverse was proper, plaintiff having the right to bring suit against one or more of the partners individually as he might elect; and the fact of the levy being made upon the partnership property presented no reason for the quashing of the writ.

ERROR, from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Affirmed.

The facts are stated in the opinion of the court.

MAX FROST, GEO. W. KNAEBEL, and EDWARD L. BARTLETT for plaintiff in error.

An attachment under our statutes can not issue on the ground of nonresidence solely, unless all the

debtors are nonresidents, so that process can not be served upon them. Curtis v. Hollingshead, 14 N. J. Law, 408–410; Cowden v. Harford, 4 Ohio, 133–135; Taylor v. McDonald, Id. 150–156; Leach v. Cook, Trustee, 10 Vt. 239.

Even if attachment would lie on the ground of the nonresidence of one partner, plaintiff has not alleged that Curran was a partner, but charges him solely, and then attaches the partnership property to pay a debt which it charges was his own. Such practice is illegal and unprecedented. Edwards v. Hughes, 20 Mich. 289, 291; Cowden v. Harford, supra; Johnson & Co. v. Smith, Morris (Iowa) 105; Bank v. R. R., 11 Wall. 628. See, also, White and Schnelby's case, 10 Watts (Pa.) 217.

It is the firm or copartnership which is the "debtor," although each member of the firm may be liable for the debt, but individual members are not primarily the "debtors." 10 Vt. 239, supra; Strawbridge v. Curtis, 3 Cranch. (U. S.) 267; Curtis v. Hollingshead, supra.

"The interest of a resident partner can not be levied on even for a partnership debt in an attachment on the ground of nonresidence of his copartner," etc. Wallace v. Galloway, 5 Cold. (Tenn.) 510; 1 Wade on Att., secs. 52, 80; Wiley v. Sledge, 8 Ga. 532; Connon v. Dunlap, 64 Id. 680; Staats v. Bristow, 73 N. Y. 264, 268; Edwards v. Hughes, 20 Mich. 289, 291; Curtis v. Hollingshead, supra, 403.

E. A. FISKE for defendant in error.

There was no error in sustaining the demurrer to the pleas in abatement of defendant to the declaration. Comp. Laws, secs. 1845, 1846, 1886, 1889; Bates on Part., secs. 454, 1068; Hunter v. Martin, 57 Cal. 365; Hawley v. Hurd, 56 Vt. 617, 621; Kent v. Wells, 21 Ark. 411; Clark v. Jones, 6 S. Rep. (Ala.) 362, 364;

Manning v. Osgood, 23 N. E. Rep. (Mass.) 732; Gates v. Matson, 54 Mo. 590, 591; Bates on Part., secs. 203, 205.

The demurrer to the answer to the attachment affidavit was properly sustained. Comp. Laws, sec. 1923; Lanckton v. Wolcott, 47 Mass. 307; Smith v. Orman, 17 Wis. 395, 397; Stanley v. Ogden, 2 Root (Conn.) 262; N. H. M. Co. v. Fowler, 28 Conn. 103; 5 Am. and Eng. Ency. Law, 179, sec. 1, p. 161, note 1; Drake on Att., sec. 66; Waples on Att., pp. 156, 102; Moore v. Otis, 20 Mo. 153, 155, 156; Bates on Part., sec. 1119, p. 1102; Cohen v. Gamble, 15 S. Rep. (Miss.) 236, 237; Wiley v. Sledge, 8 Ga. 532; Williams v. Mathersbaugh, 29 Kan. 733, 736, 739. See, also, Comp. Laws, secs. 1944, 1960; Switzer v. Carson, 9 Mo. 740–742; Temple v. Cochran, 13 Mo. 116; France v. Connor, 27 Pac. Rep. (Mont.) 569, 575, 576; Staab v. Hersch, 3 N. M. 209; Talbott v. Randall, Id. 364; Drake on Att., secs. 6, 7, 70, 70a, 73, 74, 74a, 75a, 77c, 95, 97, 101, 101 a, 716; Wapleson Att., pp. 90–101, sec. 5, p. 430; 1 Am. and Eng. Ency. Law, pp. 903, 904.

COLLIER, J.—The record in this cause shows that the W. W. Kendall Boot & Shoe Company brought an action in the district court of Santa Fe county of assumpsit by attachment, the declaration alleging that plaintiff sues Ulysses T. Curran, doing business under the firm name and style of O. Johnson & Co., and the affidavit for attachment alleges that "Ulysses T. Curran, doing business under the firm name and style of O. Johnson & Co., is justly indebted," etc., and that "affiant has good reason to believe and does believe that the said Ulysses T. Curran is not a resident of, nor resides in, the territory of New Mexico." The writ of attachment ran against "Ulysses T. Curran, doing business under the firm name and style of O. Johnson & Co.," and was returned as levied on the "effects of

the said defendant in said writ mentioned." Pleas in abatement were filed, the first alleging the liability, if any, to be joint with one Otter Johnson, who was not joined as defendant, and the second that the liability, if any existed, was that of a copartnership composed of said Johnson and defendant. These pleas were demurred to as not being good in law, and the demurrer was sustained. The defendant also filed a traverse of the attachment, alleging the residence of the said Johnson in the territory, where the firm was doing business, but not denying the nonresidence of the defendant. This traverse being demurred to, the demurrer was also sustained. The defendant thereupon filed a plea in bar, upon which issue was joined. By consent of the parties the cause was tried by the court without a jury, and judgment was rendered in favor of the plaintiff, and the attached property ordered sold to satisfy the same. There was also filed and included by the clerk of the district court in the transcript of the record brought here on writ of error what purports to be a motion for new trial, and the decision of the court overruling the same, but it does not appear that any bill of exceptions was had in the case, or made a part of the record therein.

There being no bill of exceptions in this case, we can not consider, as has been repeatedly decided by this court, any error of the lower court except of law apparent upon the record. It appears from the record that upon the sustaining of the demurrer to defendant's pleas of abatement he pleaded to the merits, and issue being joined thereon, the cause was tried by the court without a jury. It was his option to have stood upon his pleas, but this he declined to do, and by pleading to the merits he must be deemed to have abandoned his pleas in abatement. We, however, do not see any error of law in sustaining the demurrer, even

ABATEMENT: joint obligation: non-joinder of co-obligor: demurrer.

though it might be held there was no abandonment of these pleas. As to the first plea, which sets up the failure of the plaintiff to join one O. Johnson in the action as a codefendant, because of an alleged joint liability, our statute, being the lex fori, prescribes that in all cases of joint obligations and joint assumptions of copartners and others suits may be brought against any one or more of those who are so liable. Comp. Laws N. M., sec. 1846.

ACTION against single partner: demurrer.

As to the second plea, which merely alleges a New Mexico partnership, and its indebtedness, if any, upon the supposed cause of action, it is also prescribed by our law that suit may be brought by or against a partnership as such, or by or against all or either of the individual members thereof. Id., sec. 1886. The fact that the defendant is sued as "Ulysses T. Curran, doing business under the firm name and style of O. Johnson & Co.," does nothing more than serve as descriptio personae, and the plea admits that he is sued merely as Ulysses T. Curran.

ATTACHMENT: nonresidency: traverse: demurrer.

As to the decision of the lower court sustaining the demurrer to the traverse of the grounds of attachment, it might be said that, following the principle enunciated in the case of Ripley v. Mining Co., 6 N. M. 415, this alleged error would be considered, notwithstanding the plea in bar subsequently filed, and the joining of issue, and the trial of the main issue. Without intimating our concurrence in the view taken in Ripley v. Mining Company, supra, we will pass upon this assignment. We think the sustaining of the demurrer was proper, as there was no denial in the traverse of defendant's nonresidence and, as we have already remarked, the action could be properly brought against one or more of the partners individually, if plaintiff so elected. The fact of the levy being made, as it is said, upon

partnership property, presented no reason for the quashing of the writ. If it be true, as claimed, that partnership property can not be seized upon attachment for the individual debt of a member of a firm (as to which we express no opinion), that would be upon the theory that the partnership property stood, as to such attachment, just as does the property of a stranger to the writ. In such a case the remedy is by a suit in replevin or in trespass against the sheriff levying the writ. We therefore find no error apparent of record in this case, and the judgment of the lower court is affirmed.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

[No. 574. On Rehearing, September 1, 1896, Overruling Same v. Same, 8 N. M. 110.]

JOHN G. ALBRIGHT ET AL., APPELLEES, v. TEXAS, SANTA FE & NORTHERN RAILROAD COMPANY, APPELLANT.

1. CORPORATIONS—UNPAID SUBSCRIPTIONS TO CAPITAL STOCK.—The unpaid subscriptions to the capital stock of a corporation are, in equity, a trust fund for the benefit of creditors.

2. CREDITORS' BILL—JUDGMENT—EXECUTION—RETURN OF NULLA BONA. Held: That where it is sought to reach, by equitable process, the equitable interests of a debtor, the bill must set forth a judgment in the jurisdiction where the suit is brought, the issuing of an execution thereon, and its return unsatisfied, or must allege facts showing it was impossible to obtain such a judgment in any court within such jurisdiction, unless otherwise provided by statute. Tube Works Co. v. Ballou, 146 U. S. 523.

3. HEARING—DECREE PRO CONFESSO AS TO DEFENDANT PERSONALLY SERVED, BUT NOT ANSWERING—PROOF.—Held: That where complainant brings his case to a hearing and fails to take a decree pro confesso against a defendant personally served, but not answering, before taking a decree against such defendant, complainant must prove his case.

4. AMENDED BILL, FAILURE TO SERVE NOTICE OF.—Where leave was granted to file an amended bill on condition that defendants be served with notice thereof before the cause come to a hearing,—Held: That a decree pro confesso taken on the same day without serving defendants with process could not stand against them.

ON REHEARING. Reversed (with directions). LAUGHLIN, J., concurring, and BANTZ and HAMILTON, JJ., in result.

The additional facts are stated in the opinion of the court.

E. A. FISKE and CHARLES A. SPIESS for appellant.

W. B. CHILDERS for appellees.

COLLIER, J.—It is stated in the original bill and repeated in the amended bill, that on the judgment recovered by Albright there was issued on November 24, 1885, an execution, and that afterward on January 13, 1886, the sheriff made a return of nulla bona, and that there was a similar return on the execution issued on the Marshall judgment. The sheriff's return on the Albright execution of January 13, 1886, shows "that after diligent search I am unable to find any property of the defendant in my county subject to execution, and I further certify on the fourth day of December, 1885, in my county, I served a written notice as garnishee, together with a copy of execution upon one Lehman Spiegelberg," etc., etc. There was no return of nulla bona shown on the Marshall execution.

The record also shows that a venditioni exponas upon the Albright execution, issued out of the district court on June 6, 1887, for the sale of certain property levied on as the property of the defendant company on January 27, 1887, being two locomotives, a number of cars, timber, ties and other things, that on June 22, 1887, the sheriff advertised said property for sale on July 11, 1887, but received notice from the president of defendant company that the property did not belong

to it, but to the Southern Trust Company; he postponed sale notifying plaintiff's counsel, that he demanded an indemnifying bond, and it not being furnished the sheriff made public proclamation, that the sale of the said property would not take place. It is not shown that anything further was done with said execution, nor that anything was done with the garnishment served under the first execution.

Upon the rehearing which was granted, the whole case was again elaborately argued, the solicitor for appellant urging strenuously and with great zeal, that the decision already rendered in this cause holding that unpaid subscriptions for stock are in equity a fund, for the benefit of creditors, though conceded by him in his brief on the first hearing, is not the law since the decision of Hollins v. Brierfield Coal & Iron Co., 150 U. S. 381. We think the construction counsel seeks to put upon this decision, viz.: That it is a modification if not an absolute reversal of prior decisions of the United States supreme court is not tenable; and his brief in the paragraph quoted by us in our former decision is still, we believe, a correct exposition of the law on this subject. Referring, however, to the additional statement of facts above set forth, it appears, that as to the Marshall judgment there has not been even an execution issued, and of course no return of nulla bona. Unless the garnishment served upon the execution prevents, it may be said that there was a return in January, 1886, of nulla bona upon the execution on the Albright judgment. But it also appears that a year later another execution issued upon the Albright judgment, and that there was property levied on apparently largely exceeding in value the amount of the judgment, and that no sale was made of the same, because it was claimed by the president of defendant company, to be property not belonging to it. The sheriff declined to proceed

CORPORATIONS: unpaid subscriptions.

with the sale thereof, because of refusal on plaintiff's part to give an indemnifying bond.

It is urged by counsel for appellees, that whether the statement of the president of defendant company, that the property levied on was not its property was true or false, so far as this case is concerned it was a statement binding said company, and that said return, containing said statement, was equivalent to a return of nulla bona. If it had appeared in the sheriff's return, that after diligent search he had been unable to find any other property of defendant, this conclusion or presumption might possibly arise, but no such statement appears, and strictly it would have to be held, that allegations of the bill and amended bill as to there being returns of nulla bona upon executions of said judgments or either of them, are not proven. While counsel for appellees contended in his oral argument, that return of nulla bona was merely one of the means of showing insolvency, so that the right of the creditor of a corporation to sue for unpaid subscriptions on stock would accrue, yet in his brief on the rehearing he contends as to the time the statute of limitations began to run, and supports his contention with much authority, that the creditor must have obtained judgment against the corporation, with a return of nulla bona, before he can sue the stockholders.

CREDITORS' BILL: judgment: execution: return of nulla bona.

Thus in Taylor v. Bowker, 111 U. S. 110, the court holds that under the Maine statute the creditor could not file his bill until execution was returned nulla bona. The rule as to this is plainly stated in National Tube Works Co. v. Ballou, 146 U. S. 523, in which it is said that: "Where it is sought by equitable process to reach equitable interests of a debtor, the bill UNLESS OTHERWISE PROVIDED BY STATUTE, must set forth a judgment in the jurisdiction where the suit is brought, the issuing of an execution thereon and its return un-

satisfied, or must make allegations showing that it was impossible to obtain such a judgment in any court within such jurisdiction." The point of there being no return of nulla bona was not directly involved in National Tube Works Co. v. Ballou, supra, as the suit was upon a foreign judgment, and was dismissed upon demurrer, because there was no averment of any judgment or effort to obtain one, or that it was impossible to obtain one, but in the discussion of the case the above doctrine was laid down, and for its support Taylor v. Bowker, supra, and numerous other decisions were cited.

In Terry v. Anderson, 95 U. S. 628, one of the cases cited in National Tube Works Co. v. Ballou, supra, it is said by the court that "ordinarily a creditor must put his demand in judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment, and to this rule, however, there are some exceptions."

In the case of Jones v. Green, 1 Wall. 330, there was a bill by judgment creditors to subject property held in secret trust, it being alleged that the debtor was insolvent. There was a decree in favor of complainants, and it was held, that the objection that it was not shown that complainants had attempted to enforce their remedy at law was fatal to the relief prayed. The bill alleges that executions were issued upon the judgments of complainants, and were returned unsatisfied, but no proof on this subject was produced at the hearing. This is precisely the situation as to the Marshall judgment, as no execution whatever is shown to have issued, and the only question as to the Albright judgment is whether there is a sufficient return showing nulla bona.

Jones v. Green, supra, went up from the territory of Nebraska, and it seems in harmony with National Tube Works Co. v. Ballou, supra, in the principle an-

nounced by the latter that UNLESS OTHERWISE provided by statute there must be judgment, and return of the same unsatisfied. We have examined with care the authorities, which counsel for appellees cite in support of the contention, that the return of nulla bona is not essential to the giving of these plaintiffs a standing in a court of equity, and notice them as follows:

The case of Terry v. Tubman, 92 U. S. 160, shows that a demurrer was filed to the plea of the statute of limitations framed upon the statute in force in the state of Georgia, the demurrer proceeding upon the idea, that the plea was bad inasmuch as it merely alleged the notorious insolvency of the corporation, as a starting point of the statute, and the demurrer was overruled distinctly upon the ground that such an allegation was at least the equivalent of what was alleged in the bill about insolvency of the same corporation, and that the demurrer cut back to the first error in pleading.

The inference in this decision is rather against than in favor of appellees' contention.

The case of Camden v. Doremus, 3 How. 533, was a suit upon a guaranty, and the court's holding was based solely upon a construction of the words "use of reasonable and due diligence" found in the contract of guaranty, and is in no sense an authority on this question.

The case of Reynolds v. Douglass, 12 Pet. 497, is more nearly in point, as there it is held that in an action at law against a guarantor, the insolvency of the principal debtor need not be proved by record evidence, but it should not be construed as militating against what in the cases herein cited, is stated to be the rule governing creditors, who pursue equitable interests of a debtor after judgment obtained.

The only cases counsel refers us to as seeming directly in point, are Tabb v. Williams, 4 Jones Eq. (N. C.) 352, and Hough v. Cress, Id., and there it is

stated that relief ought to be had whenever by an execution and return of nulla bona OR OTHERWISE it appears, etc., but in the first place these cases seem to conflict with the supreme court of the United States, and in the second place, the bill in this case claims relief simply upon the ground of a return of nulla bona, and not upon any other ground as showing insolvency.

For these reasons which are more elaborately considered, than in our former opinion, we think the conclusion we arrived at was erroneous, and that the judgment of the lower court should be reversed.

As to the extent this reversal goes is a matter we will proceed to discuss. Certainly it should be reversed as to the appellants Lehman Spiegelberg and Bernard Seligman, and it remains to be considered what should be done as to the defendants and appellants Gildersleeve, Martinez and Ortiz y Salazar.

The record shows "leave to amend bill filed to correspond with proofs taken, and that defendants are required to answer said amended bill within twenty days from the time of service of copy of same, and that said cause be set down for hearing as soon as same is at issue on the amended pleadings."

The amended bill was filed on June 30, 1892, and notice thereof and order allowing it to be filed and be answered in twenty days after service of copy thereof was served on "C. H. Gildersleeve for himself and E. A. Fiske solicitor for defendants in the said cause" on June 14, 1892. There is nothing showing that Martinez or Ortiz y Salazar was given notice either personally or through their solicitor, unless notice to Gildersleeve, which on its face was restricted to him personally, can be considered notice to them.

Neither Martinez, Ortiz y Salazar nor Gildersleeve answered the amended bill though the final decree recites that Gildersleeve did. As to Martinez and Ortiz y Salazar the final decree recites a failure to answer

and that the amended bill "be taken as confessed" as to them and defendant company. Neither is there anything in the record that notice of the filing of the amended bill was given to defendant company. The amended bill differs from the original bill in that it sets forth more at length the alleged transactions of the charter subscribers in subscribing for stock, and failing to pay cash required for organization, but putting up checks never intended to be presented for payment instead.

HEARING: decree pro confesso as to defendant personally served but not answering: proof.

It appears, therefore, that in the order giving leave to file the amended bill two things were required: (1) That it was to correspond with the proofs already taken; and (2) that defendants were to be served with notice of the amended bill before the cause could come to a hearing.

If what we have already said in this opinion as to complainants' failure to show a return of nulla bona be true, it would seem that the amended bill, inasmuch as it merely repeats the allegations of the original bill on this subject, does not conform to the proofs taken, and if Martinez and Ortiz y Salazar had no notice of the filling thereof, they ought not to be bound by complainants' act with respect to the amended bill.

That leave in effect authorized the complainants to set forth in apt language by their amended bill the necessary averments which were justified by the proofs already submitted. A reply to this may be, however, that so far as Martinez and Ortiz y Salazar are concerned they had established by the decree pro confesso upon the original bill the fact that there had been a return of nulla bona, though the same can not be said as to Gildersleeve. As to Gildersleeve we think the matter may be disposed of by saying, that he either answered or he did not answer. If he answered as the final decree recites, there is the same infirmity in proof as to him,

as against Spiegelberg and Seligman. If he did not answer there should have been a decree pro confesso, and none was taken.

It is held in Pegg v. Davis, 2 Blackf. (Ind.) 281, that if any particular claim be not answered a decree may be taken pro tanto as confessed, and that if complainant instead of so doing bring the case to a hearing, he can only be entitled to relief in this regard by proving it. This decision presupposes the necessity of taking a decree pro confesso upon the whole bill, or proving the case.

It has been held in Shields v. Bryan, 3 Bibb. (Ky.) 525, that a decree can not be taken against a defendant not answering unless default has been taken, and in Carmen v. Watson, 1 How. (Miss.) that where one of the codefendants did not answer a decree against him without taking the bill pro confesso was irregular and should be set aside.

As to the defendants Martinez and Ortiz y Salazar, we find it stated that after an order to take the bill pro confesso has been obtained, it can not be amended even to the extent of correcting a clerical error without vitiating the proceedings. 1 Danl. Ch. Pr., sec. 522.

AMENDED bill: failure to serve notice of.

And in Harris v. Dietrich, 29 Mich. 366, that if a bill is materially amended when the defendant fails to appear, the decree pro confesso taken on the same day and without serving process, is irregular and sufficient grounds for opening it, and granting a rehearing.

As enforcing the idea that in the absence of a decree pro confesso the complainant must prove his case, it is stated to be at the election of complainant to take a decree pro confesso, when the cause shall be proceeded in ex parte, etc. Rule 14 of Equity Rules.

Unless it is within the province of this court to enter a final decree against the defendants Martinez and Ortiz y Salazar upon the original bill, it is diffi-

cult to see how any such decree may be entered against them at all. We think it should be held that appellees stand before the district court, and now stand before this court, asking relief not upon the original but only upon the amended bill, and it not appearing that Martinez or Ortiz y Salazar have ever had any day in court as to the amended bill the decree against them thereon can not stand.

Wherefore it is considered and ordered that the judgment heretofore rendered by this court, affirming the decree of the district court be, and the same is upon this rehearing, set aside, and the cause is reversed with directions to the district court to vacate in conformity with this opinion the decree entered in the district court, with costs in behalf of appellants to be taxed.

LAUGHLIN, J., concurs.

BANTZ, J.—Without dissenting from the views expressed by Justice COLLIER, I prefer to base the judgment of reversal upon the distinct ground that the indebtedness for which a decree was rendered against appellees was barred by the statue of limitation.

HAMILTON, J. (concurring).—I concur in the conclusion reached by the court in this case, and think the judgment should be reversed; but I can not agree with the views expressed in the opinion upon the question of what is known as the "trust-fund doctrine;" nor can I agree with the court as to the effect to be given to the decision of the supreme court of the United States in the case of Hollins v. Iron Co., 150 U. S. 371. I understand the doctrine as announced and approved by that decision to be that there is no direct and express trust or lien attached to the property and assets of a corporation in favor of its creditors so long as the corporation remains a solvent and going

concern; that, when a corporation is created and placed in operation under its charter, it is a distinct entity—a distinct personality—in the eyes of the law; and, while it remains solvent, it has the same right to control and direct its affairs within the limits prescribed by the terms of its charter that an individual would have over his property. It has the right to acquire, lease, mortgage, sell, and dispose of its property within the limits of its charter, and so long as it acts without fraud or collusion, to the detriment of its stockholders or creditors. If its directors or officers attempt, by fraudulent means, to convey or misapply its funds or property, then a court of equity will interfere to protect the rights of the creditors and stockholders. But, while it remains solvent, it controls and directs its affairs independent of its creditors and stockholders, and there is no express trust or lien in favor of either against its funds or property. Becoming insolvent and in the hands of the court, it loses control over all its assets, and the same at once become a trust fund in the custody of the court, who, in the absence of a trustee, administers upon and distributes them for the benefit of those who, under the law, may be entitled to them. Solvent and going, there is no lien or trust relation between the creditor and the company, but only the ordinary relations of debtor and creditor. Insolvent and in the custody of the court, the relations of trustee and cestui que trust at once arise, and the chancellor administers the trust, and disposes of the property, and distributes the proceeds —first, to the creditors, and, secondly, to the stockholders.

It is earnestly contended by counsel for the complainants that this position is in open hostility to the fixed and settled doctrine of the supreme court of the United States, announced in all of its previous decisions. It is insisted that the capital stock of an

incorporated company is a fund set apart for the payment of its debts; that the corporation is merely a trustee, holding its property for the benefit of its creditors and stockholders.

It may not be out of place to look into some of the previous decisions of that court upon this question, and see if such a doctrine as contended for has really ever been the settled rule of that court, and, if so, to what extent has such rule been modified by the rule in the Hollins case, above cited. Perhaps the most positive and expressive language of that court upon this subject is to be found in the opinion of Justice SWAYNE in the case of Sanger v. Upton, decided in October, 1875, and reported in 91 U. S. 56, as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity." In order to understand fully the scope and meaning which should be given to the language of the court used in the above quotation, we must be advised as to the nature of the case which the court then had under consideration, that we may understand the principles of law therein declared as applied to the facts of the case which were then before the court. The Great Western Insurance Company, with an authorized capital of $500,000, had become insolvent, as a result of the great Chicago fire, of 1871. It was forced into bankruptcy, and all of its effects had passed into the custody of the bankrupt court, and were being administered by its assignee. Its assets consisted largely of the unpaid subscriptions to its capital stock. The bankrupt court, under the authority given it, and to provide means for the payment of

creditors, made an order which had the effect of a call upon the delinquent subscribers for their unpaid subscriptions, and the assignee, Upton, was ordered to collect the same. The appellant, Sanger, declined to pay, and suit was brought by the assignee to recover upon the stock. The company having become insolvent, and its property and effects having passed into the custody of the bankrupt court, to be administered by its assignee, the court held that the unpaid subscription to the capital stock was a trust for the benefit of the creditors. The court was there dealing with the property of an insolvent and dissolved corporation, then in its custody, and held that all of its property and effects, including its unpaid subscriptions to its stock, were a trust fund set apart for the payment of the debts of the company. Broad as is the above language used by the court, it must be construed as applying to a class of cases such as the one then under consideration. The court was then dealing with a bankrupt corporation, and announced a doctrine and applied a rule governing the property of a corporation in its insolvent state. I can not believe that the court intended to announce a broad and unvarying rule which should apply as well to the property and assets of a solvent and going corporation as it did to the property of an insolvent company in the hands of the court. Solvent and going, the property and assets of a corporation are managed and controlled absolutely by the directors and officers of the company, subject only to the rules of law applicable to debtor and creditor, and the right of the latter to collect its demands. If the company becomes insolvent, and is taken charge of by the court, the conditions in relation to its property at once change. The company loses control, and a trust is created on behalf of both creditor and stockholder against such property and assets; and the right then to have the same collected, converted into money,

and applied by the court to the payment, first, of the creditors, and next to the stockholders, clearly exists. If an attempt should be made by the directors or officers of the insolvent corporation to fraudulently misapply its funds, or to engage in enterprises not warranted by its charter, the stockholders may interfere and call them to account for such action, and prevent such attempted abuse of their powers. This right of the stockholders of a solvent corporation to interfere in such cases is based, not upon the idea that they have a lien upon the property of the company, or an express trust in their favor, but upon the ground that the agent may always be compelled to account for the misapplication of the funds of his principal, and for the abuse of the power of his agency. I do not think that the supreme court, by the language used in the case of Sanger v. Upton, supra, or in other similar cases, intended to lay down the universal rule that the property and assets of a solvent and going corporation are a trust fund in the hands of the company, for the benefit of its stockholders and creditors, but intended only to make such rule applicable to corporations which were insolvent and in process of liquidation. That this is the correct view as to what has been decided by that court is confirmed by the language used by it in subsequent decisions.

In the case of Webster v. Upton, assignee, decided by the same court, at the same term, and in a case arising out of the same bankrupt company, brought by the assignee to collect its unpaid stock subscriptions, Justice STRONG, on page 71, in speaking of the liability of the subscribers for the unpaid subscriptions, observes: "This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent." 91 U. S. 71. This clearly shows that the court, in the use of the language in the Sanger case, "that

the capital stock of a corporation is a fund set apart for the payment of the debts to that extent," intended only to apply the same to insolvent corporations in process of liquidation by the court, and not to solvent corporations generally.

In the case of Terry v. Anderson, 95 U. S. 628, the Planters' Bank of the state of Georgia had become insolvent and failed, and an assignment was made for the benefit of its creditors. A bill was filed against the stockholders to reach the unpaid subscriptions to the stock of the bank. Chief Justice WAITE, in delivering the opinion of the court, says: "Ordinarily, a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund, which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee." The court in that case was dealing with an insolvent corporation, and settling a controversy between the creditors of the company and the liability of a delinquent subscriber, and declares simply that the assets of an insolvent corporation are a trust fund which will be administered by a court of equity, and would not allow the trust to fail for want of a trustee.

In the case of Graham v. Railroad Co., 102 U. S. 148, a bill was filed by the complainant, Graham, against the La Crosse & Milwaukee Railroad Company, and the Milwaukee & St. Paul Railway Company, and Moses Kneeland and others to set aside certain conveyances made by the officers and agents of

the company of certain real estate belonging to the company, and to subject the same to the payment of the claims of the complainant, who became a judgment creditor of the company subsequent to the conveyance. The conveyances were alleged to have been fraudulently made by and to the agents and officers of the company, and for less than their full value. The conveyances were made at the time when the company was a solvent and going concern. The supreme court affirmed the decision below, denying the right of recovery. Justice BRADLEY, in delivering the opinion of the court, in discussing the trust-fund doctrine, and the right of solvent and insolvent corporations to manage and dispose of their property and assets, on page 160, 102 U. S., observes: "It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same. Its interest is the same. Its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their

part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." If the language used by that court in any of its previous decisions were such as to leave a doubt as to its position upon the trust-fund doctrine, and as to the power of a corporation over its funds or property, or as to the legal relations existing between a corporation and its stockholders, such doubt is clearly removed by the expressive language used by Justice BRADLEY in this decision. It is, in effect, that a corporation, in its solvent condition, subject only to the terms of its charter, has absolute dominion over its property and assets, freed from any lien or trust in favor of either the creditor or stockholder. Becoming insolvent, the corporation is civilly dead; and a court of equity, at the instance of the proper parties, will take charge of its property and effects, and will administer them as a trust fund, for the benefit of those who may be entitled to it. The insolvency of the company, and the possession of its affairs by the court, convert at once all of the property into a trust fund, which till then is not a trust fund, or subject to any lien on behalf of the creditor.

In the case of Railway Co. v. Ham, 114 U. S. 587, there had been a consolidation of four railroad companies, under an agreement whereby the new company was to protect the rights of the old companies. The new company, subsequent to the consolidation, executed a new mortgage on all the property, to pay a large bonded indebtedness. In a controversy between

the bondholders of the new company and a mortgagee of one of the old companies, it was contended that the property of the original company, the Toledo & Wabash Railway Company, was a trust-fund for the payment of all its creditors; and, when the new company took the property of this company under the consolidation, it took it charged with that trust. Justice GRAY, in delivering the opinion of the court (114 U. S. 594) says: "The property of a corporation is, doubtless, a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders."

The case of Hawkins v. Glenn, 131 U. S. 319, was a bill in equity filed by Glenn, as trustee of the National Express & Transportation Company, an insolvent corporation, to recover the unpaid subscription due from delinquent shareholders. Chief Justice FULLER, in rendering the opinion of the court (131 U. S. 332, 9 Sup. Ct. 743), observes: "Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust sub modo, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust."

In the case of Fogg v. Blair, 133 U. S. 534, the St. Louis & Keokuk Railroad Company was chartered by the legislature of the state of Missouri in 1867. It located its road, and the appellant, Fogg, did something over $9,000 worth of work for the company, the amount of which was settled upon between him and the company in September, 1870. In June, 1872, another company, known as the St. Paul, Hannibal & Keokuk Railroad Company, was also chartered; and,

under an arrangement made between the two companies, the first company sold to the latter all its property and effects, the latter agreeing to assume and pay all liabilities incurred by the first company. Subsequent to this, the new company executed a mortgage to the defendant, Blair, as trustee, to secure a large amount of bonds issued by the new company upon the road. Upon default being made upon the bonds, Blair brought a suit to foreclose the mortgage, to which Fogg was made a party. The latter answered, and filed a cross bill, claiming a lien prior to the bonds, and contended that the new company, under the contract of purchase, took all of the property of the old company, charged with a trust in favor of himself and other creditors of the old company. This contention was denied, and the cross bill dismissed. Justice FIELD, rendering the opinion of the court (133 U. S. 541), says: "We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it can not be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

A careful examination of the above cases will show that they do not support the contention that there is any direct trust or lien upon the property and assets of a corporation in favor of its creditors. I do not think that that court, in any of the above cases, intended to declare such a rule to be the doctrine of

that court; but, if there should have existed any doubt upon this subject from any language used by the court in any of the above cases referred to, then such doubt is clearly removed, and the position of that court distinctly defined, by the clear language used by it in the case of Hollins v. Iron Co., 150 U. S. 371. The defendant company was created a corporation under the laws of Alabama. In 1882 it made and executed to Preston B. Plumb a mortgage to secure $500,000 in bonds. In August, 1887, he, as trustee, took possession of all of the property, and filed a bill to foreclose the mortgage. Some three months after the commencement of this suit, the complainant, who was simply a contract creditor, with no lien upon the property, filed a bill on behalf of himself and other unsecured creditors against the company, the trustee, and unpaid subscribers to the stock of the company, charging that the bonds and mortgages were invalid, setting up the unpaid subscriptions to the stock, asking for a receiver, that the stock be collected, and that the property be sold for their benefit. A decree of foreclosure was entered in the Plumb suit, and the bill of the complainant dismissed. It was contended by the complainant that the property and assets, including the unpaid subscriptions to the capital stock of the company, were a trust fund for the benefit of himself and other general creditors, which could be enforced in their behalf. The court, by Justice BREWER, after reviewing the decision of that court upon the doctrine of trust funds, observes (150 U. S. 381): "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur., section 1046, they 'are not, in any true and complete sense, trusts, and can

only be called so by way of analogy or metaphor.'" And the court, in further discussing this subject, on page 383, says: "In other words,—and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Further continuing this discussion, the court says, on page 385: "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

The relation existing between a corporation and its creditors is somewhat analogous to that which exists between a partnership and its creditors. If a partnership becomes insolvent, a court of equity assumes charge of all of its property and effects, and, through its

officers, collects and distributes the fund, first, to partnership creditors, before any portion of it can be applied either to the partner or to his individual creditor. It may be said that the court holds the property in trust for the partnership creditors, or that they have an equitable lien thereon. This means that the partnership creditors simply have an equitable prior right to have their claims satisfied out of the partnership property in the hands of the court belonging to the insolvent partnership before individual creditors can be paid. So it is with a corporation. Solvent and out of the hands of the court, it holds complete dominion over its property, unfettered by any direct trust or specific lien in favor of either creditor or stockholder. It can deal and be dealt with in relation to its property as effectually as an individual can with his. While the directors and officers stand in a fiduciary relation in respect to its property, and may be called to account by the stockholders for any fraud or mismanagement of its affairs, yet, as between the corporation and its creditors, there exists simply the relationship of debtor and creditor, and the company does not hold its property charged with any direct trust or lien in their favor. It may be contended that his view is in antagonism to the prevailing and settled opinions of both state courts and text writers upon this subject. Whatever may have been the views of text writers, ratified and supported as they may have been by courts of high state authority, it is sufficient for us that the supreme court of the United States, in the case last cited, has given, in clear and unambiguous language, its latest emphatic expression upon this question, and its opinion is a controlling authority upon this court.

It is said that to adopt this view is to overturn a settled rule applicable to trust funds which, from the days of Judge Story, has grown and become deeply imbedded in our state and national jurisprudence. To

say that this will overturn a settled rule is but to confound the destruction of a principle with the time and manner of its application. There is a wide distinction between overturning a principle and the time, method, and circumstances of its application. The principles underlying the trust fund doctrine, as applied to the property and assets of a corporation, are not overturned, but still exist; not, however, in the broad and unlimited degree which some courts of high authority have announced, but in a more limited sense; not in the broad sense that the entire property and assets of a solvent and going corporation are a trust fund, charged with an express trust or a specific lien in favor of either stockholder or creditor, but in the sense that when the conditions and circumstances in relation to the business of a corporation arise, when it becomes insolvent and in the custody of the court, then the principles of the trust fund will apply, and will lay hold of the property, and, under the supervision of the court, will be administered to the creditors and stockholders. We may observe that this view is consonant with both logic and reason. The trust fund idea had its origin in the early history of our jurisprudence, when the business of the country was confined to narrow limits, when there were comparatively but few organized companies engaged in the transaction of business, and when there were but few, if any, railroad corporations in existence. From a provincial state, we have become a great commercial nation, whose vast business interests are largely owned and conducted by artificial persons, in the form of corporate bodies. Probably four fifths of the capital invested in the commerce and business of the country is controlled and managed in this manner. To declare that this entire property is held by those corporate bodies charged with an express trust in favor of the individual stockholders, or covered by a specific lien in favor of the creditor, is to extend the application of the

trust fund idea to a dangerous limit, and to a limit never comtemplated by the founders of that doctrine. This is not the abrogation of the rule, nor the destruction of the doctrine, but simply to limit its application to that class of cases where the facts and circumstances will justify the courts in invoking its aid for the relief of creditors and stockholders.

The individual defendants in the case under consideration could not, or did not, pay their ten per cent on their subscriptions to the stock of the railroad company. The officers and directors of the company conceived that it would be to the interest of the company to take back this stock from these original subscribers, sell and negotiate it to other persons, and thus utilize it in the construction of the road. This the officers and directors of the company did, at a time when the corporation was solvent, and managed by a board of directors and officers composed of other persons than the defendants. The corporation, by this transaction, did not lose the benefit of this stock subscription, but controlled and disposed of the same, so that the company received the full benefit of it in the final construction of the road. The company being a solvent and going concern at the time of this transaction, there was no lien or trust in favor of the complainants as against this stock or the unpaid subscriptions of the company; and the directors, pursuing a course which they deemed for the best interest of the company, chose to take back the stock, and sell and dispose of it to other parties, for the use and benefit of the company; and, there being no actual fraud alleged or shown in the transaction, the complainants have no legal right to complain.

I therefore concur in the conclusion reached by the court, upon the grounds herein stated, and also upon the grounds stated by Associate Justice BANTZ as to the statute of limitation.

[No. 618. September 1, 1896.]

FRANCISCO GONZALES y BORREGO et al., PLAINTIFFS IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT IN ERROR.

CRIMINAL LAW—REVIEW OF JUDGMENTS OF DISTRICT COURTS BY WRIT OF ERROR—STAY OF EXECUTION.—The judgments of the district courts of the territory of New Mexico, in criminal cases, are reviewable in the supreme court of the territory by writ of error, which operates as a stay of execution in such cases, though no provision is made for supersedeas, being a supersedeas by implication.

ID.—SPECIAL TERM—CONTINUANCE BEYOND TIME OF REGULAR TERM—VALIDITY.—Proceedings, in a murder case, at a special term of the district court, were not invalid because the term was continued beyond the time fixed for the regular terms of the other counties of the district.

ID.—HOMICIDE—INDICTMENT—PLEADING—SUFFICIENCY.—A charge in an indictment that the deceased "instantly" died of mortal wounds inflicted upon him by the accused, was sufficient to constrain the conclusion that his death was effected on the spot, at the place where it was caused, as the equivalent of "then and there."

ID.—MURDER IN FIRST DEGREE—INDICTMENT—PLEADING—SUFFICIENCY.—An indictment charging that the accused "unlawfully, feloniously, willfully, purposely, and with express malice aforethought did shoot and kill" deceased, embodied in its terms all the elements necessary to constitute murder in the first degree, so distinctly and comprehensively as to exclude murder in any less degree.

ID.—MURDER—ALIBI—ONUS—REASONABLE DOUBT—INSTRUCTION.—An instruction that it was incumbent on defendants to establish, by a preponderance of the evidence, that they were not at the place where the murder was committed or were in some other place, away from the place of the murder, but not beyond a reasonable doubt, and imposing on the prosecution the obligation to demonstrate beyond a reasonable doubt that the defendants were at the place where deceased was killed, and giving defendants the benefit of their testimony to create in the minds of the jury a reasonable doubt as to their being at the place, was not error.

ID.—MURDER—EVIDENCE—ADMISSIBILITY.—On a trial of B., and others, on indictment for the murder of C., where G. testified that he was approached by V. with a proposition to assassinate C., that the details of the proposed assassination were discussed by V. and B. with him,

that they informed him that two of the other defendants were in the agreement, that their object was to remove C. because of his prominence and great strength in his political party, to which they were antagonistic and wished to destroy in the county, that he seemingly acquiesced in their proposition, but, having no reason to murder C., determined, on reflection, to put him on his guard, and accordingly sent him a note (which was found among the papers of C. after his death and identified by the witness), and that afterward to avoid importunity from V. and B. to cooperate with them in the assassination of C., and from fear of them as members of a certain secret society, under apprehension that they would become aware of his betrayal of them, left the territory,—Held: That his testimony and the note were admissible to prove the conspiracy.

ID.—WITNESS CONVICTED OF MISDEMEANOR—COMPETENCY OF TESTIMONY. Conviction of an offense not greater than a misdemeanor, either by the statute or at common law, will not render a witness incompetent to testify.

ID.—MURDER—ALIBI—CROSS-EXAMINATION OF ACCUSED—JUDICIAL DISCRETION.—In a murder trial, where defendants, claiming an alibi, testified to their whereabouts from 7 o'clock P. M. of the night of the murder, it was within the discretion of the court to permit them to be cross-examined as to their whereabouts from the noon preceding up to that time. The rule that a witness can not be cross-examined as to any facts irrelevant or collateral to the issue merely to contradict him, does not exclude the contradiction of a witness as to any facts immediately connected with the inquiry.

ID.—MURDER—ADMISSIBILITY OF TESTIMONY—JUDICIAL DISCRETION.—The refusal, on such trial, to permit defendants, who were at a certain place at a certain time prior to the murder, to introduce testimony to show that the persons, who testified that they saw defendants at another place at that time, were not there themselves at that time, was a matter within the sound discretion of the court.

ID.—MURDER—CROSS-EXAMINATION OF DEFENDANTS FOR PURPOSE OF IMPEACHMENT—JUDICIAL DISCRETION.—The right of the court, in such case, to permit defendants to be asked, on cross-examination, as to the killing by them, of another, a few days after the murder in question, for the purpose of discrediting them, was within the limits of a sound judicial discretion.

ID.—AMENDMENT OF RECORD NUNC PRO TUNC—PROOFS REQUIRED.—In such case, an amendment, by the trial court, of the record, by an order nunc pro tunc, to show arraignment and pleas of not guilty, was warranted by the trial judge's recollection of the facts of arraignment and pleas of not guilty, shown by the affidavits of the clerk, the sheriff, district attorney, and court stenographer, if not by a recital in the record alone, that "issue being joined," the trial was had, and a verdict of guilty returned.

ID.—RECORD, CORRECTION OF, AFTER EXPIRATION OF TERM.—The correction, by the trial court, of an omission or false entry in a record, by an order nunc pro tunc, is not limited to the term at which such omission or entry was made, but may be made "whenever the ends of justice may require it." Comp. Laws 1884, sec. 1836.

ID.—AMENDMENT OF RECORD BY ORDER NUNC PRO TUNC—EXTENT OF POWER.—And this power of the trial court to correct the record by an order nunc pro tunc extends to criminal cases.

ID.—POWER OF AMENDMENT. AFTER REMOVAL OF CAUSE BY WRIT OF ERROR.—And the trial court can not be deprived of this power to amend its record so as to make it conform to the truth, by the removal of the cause by writ of error.

ID.—QUALIFICATION OF ASSOCIATE JUSTICE TO SIT OUTSIDE OF HIS DISTRICT—CONSTRUCTION OF STATUTES.—The judicial power vested in the district courts by act of congress of September 9, 1850, to be exercised in each district, "by one of the justices of the supreme court," does not require that it shall be exercised by any particular one of the justices. There is nothing in the language of that clause, nor in the act of congress of June 10, 1858, warranting such a construction as would confine the exercise of the power to the particular justice assigned to the district, when such justice is otherwise disqualified; and the maxim expressio unius exclusio alterius, does not apply.

ERROR, from a judgment of conviction for murder, to the First Judicial District Court, Santa Fe County. Motion to quash writ denied, and judgment affirmed.

The facts are stated in the opinion of the court.

CATRON, SPIESS & GORTNER for plaintiffs in error.

The judgments of the district courts of this territory, in criminal cases, are reviewable in the supreme court of the territory by writ of error. Rev. Stats., U. S., secs. 1868, 1869; Rice v. Rex, Cro. Jac. 404; Rex v. Seton, 7 T. R. 373; Rex v. West Riding, etc., Id. 467; Reg v. Carlisle, 2 B. & Ad. 971; State v. Shepard, 37 Wis. 395; Rex v. Earberry, Fort, 37; 1 Bish. Crim. Proc. [N. Ed.], sec. 1362; Comp. Laws, secs. 2194, 2199; U. S. v. Gibson, 1 Idaho, 364; Comp. Laws, sec. 2484; Barnett v. State, 36 Me. 198, and cita-

tions; U. S. v. Plumer, 1 Cliff, 58; Holford v. Alexander, 12 Ala. 280; Adler v. State, 35 Ark. 517; McKinney v. Western, etc., 4 Iowa, 420; Hawkins v. Bowie, 9 Gill. & J. 428; Fellows v. Griffin, 9 Sm. & M. 362; Calloway v. Nifong, 1 Mo. 223; Reid's Admr. v. Stride's Admr., 7 Gratt. 76; Dows v. Harper, 6 Ohio, 518; Woods v. Caldwell, 34 Pa. St. 92; Comp. Laws 1884, secs. 2468–2473; Id., sec. 2201; Kidder v. Bennett, 2 N. M. 37; State v. Cunningham, 51 Mo. 479.

At common law, a writ of error is not a supersedeas so as to discharge from custody, but in capital cases it operates to stay execution. Whar. Crim. Prac. & Proc. 783. And it is a supersedeas by implication, where judgment is removed by the writ. 9 Bac. Abr. "Supersedeas," p. 284. See, also, Bishop of Ossory's Case, 3 Crooks, 534; State v. Pagels, 92 Mo. 300; Kitchen v. Randolph, 93 U. S. 86.

Defendant in error, having invoked the jurisdiction of this court, can not be heard to object to the consideration of this cause on the present writ of error. 2 Ency. Pld. & Prac. 349.

The court erred in continuing the special term of court and the trial of this cause, after the time for the convening of the court and the adjournment thereof at the end of the three days, as fixed by law. Comp. Laws 1884, sec. 551, et seq. See, also, Downey v. Smith, 13 Ill. 671; Bush v. Doy, 1 Kan. 86; Cooper v. Ins. Co., 3 Colo. 318; Davis v. Fish, 1 Green (Iowa), 409; Grable v. State, 2 Id. 565; Gregg v. Cooke, Peck. (Tenn.) 82; Ex Parte Lilley, 7 S. C. 372; Galushe v. Butterfield, 2 Scam. (Ill.) 227; Goodsal v. Boynton, 1 Id. 555; Mendum v. Comm., 6 Rand. (Va.) 715; Dunn v. State, 2 Ark. 249; In re Millington, 24 Kan. 160; Cox v. State, 30 Id. 202; Smith v. Chichester, 1 Cal. 409; Bates v. Gage, 40 Id. 184; Cain v. Goda, 84 Ind. 209; Batten v. State, 80 Id. 396; Newman v. Ham-

mond, 46 Id. 119; Norwood v. Kenfield, 34 Cal. 331; Earles v. Earles, 27 Kan. 542; Archer v. Ross, 2 Scam. 303.

The indictment failed to charge that deceased died within a year and a day from the assault, or within what jurisdiction he died. Such averments were necessary to distinguish murder from common assault, and to confer jurisdiction on the court. Am. and Eng. Ency. Law, pp. 636, 638; Kerr on Hom., sec. 268; People v. Wall., 9 Cal. 32; People v. Cox, Id. 33; People v. Lloyd, Id. 34; Chapman v. People, 39 Mich. 360; Comm. v. Parker, 2 Pick. 558; State v. Orrell, 1 Dev. (N. C.) 140; State v. Sides, 64 Mo. 385; State v. Lakey, 65 Id. 217; State v. Steeley, Id. 221; State v. Mayfield, 66 Id. 125; State v. Reaky, 1 Mo. App. 3; State v. Sundheimer, 93 Mo. 315; Edmonson v. State, 51 Tex. 497; Comm. v. Macloon, 101 Mass. 1; U. S. v. Ball, 140 U. S. 118; Riggs v. State, 26 Miss. 55; Davidson v. State, 34 Me. 973; State v. Hobbs, 17 S. E. Rep. 38; Whar. on Hom., sec. 791; Whar. Am. Crim. L., sec. 272; State v. Couley, 39 Me. 94; State v. Testerman, 68 Mo. 413; State v. Fley, 2 Brev. (S. C.) 346; 1 Bish. Crim. Proc. [3 Ed.], secs. 407–409; 2 Id., secs. 533, 534; 2 Whar. Pr. 114; 1 Whar. Crim. L. [9 Ed.], sec. 537; State v. Baker, 1 Jones L. 267; State v. Blan, 69 Mo. 317; State v. Shepard, 8 Ire. L. 195; 5 Bac. Abr., pp. 79–81; 1 Russ. on Crimes [2 Am. Ed.] 470; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Crook, 17 Wall. 174. See, also, U. S. v. Carl, 105 U. S. 611; U. S. v. Hess, 124 Id. 483; U. S. v. Slenker, 32 Fed. Rep. 691; U. S. v. Conant, 9 Cent. Law J. 129.

The court erred in admitting in evidence the declaration and writings of Juan Gallegos. Wright on Crim. Conspir. 217, 218; 3 Greenlf. Ev., sec. 94; State v. Larkin, 49 N. H. 44; Logan v. U. S., 144 U. S. 308. See, also, Whar. Crim. Ev., sec. 698, et seq.; 1

Phil. Ev. 94; 2 Stark, 141; State v. Haney, 2 Dev. & Bat. 390; Kirby v. State, 7 Yerg. 259; Page v. Parker, 40 N. H. 62; Lee v. Lamprey, 43 Id. 15; 2 Best. on Ev. 508; People v. Davis, 56 N. Y. 103; State v. Dean, 13 Ired. 63; Patton v. State, 6 Ohio St. 467, and numerous other authorities.

The court erred in allowing the witnesses for the prosecution, Nowell and Trujillo, who had been convicted of infamous crimes, to testify. Mackin v. U. S., 117 U. S. 352, 353; Spalding v. Saxton, 6 Watts, 338; Cox v. Cox, 26 Pa. St. 376–384; State v. Mullen, 33 La. Ann. 159; Cooper v. State, 7 Tex. App. 195.

The court erred in permitting prosecution, on rebuttal, to introduce evidence tending to contradict immaterial and collateral facts which the territory had itself adduced by its cross-examination. U. S. v. White, 5 Cranch, C. C. 39; Gaines v. Comm., 50 Pa. St. 319; Rey v. Hilditch, 5 Carr & Payne, 298; Rey v. Stimpson, 2 Id. 415; Foye v. Leighton, 22 N. H. 71; Boies v. Henney, 32 Ill. 133; Clifton v. McKensie, 5 Strab. (N. C.) 36; Kohler v. Wells Fargo Co., 26 Cal. 615.

To charge murder in any degree, the words describing the elements of that degree must be employed. State v. Love, 93 Mo. 547; Cannon v. State, 60 Ark. 564; Jones v. State, 58 Id. 390; Denham v. State, 22 Fla. 664; Wiggins v. State, 23 Id. 180; Simmons v. State, 32 Id. 387; Schaffer v. State, 22 Neb. 557; Blantin v. State, 1 Wash. 265; Blake v. State, 121 Ind. 433; State v. Fooks, 29 Kan. 425; Leonard v. Territory, 2 Wash. 381; State v. Brown, 21 Kan. 38; Smith v. State, 1 Id. 365; Bowers v. State, 5 Mo. 364; State v. Jones, 20 Id. 58; Robbins v. State, 8 Ohio St. 131; Id. 90, 306; Hogan v. State, 10 Id. 450; Loefner v. State, Id. 599; Snyder v. State, 59 Ind. 105. See, also, Tenorio v. Territory, 1 N. M. 279.

The jury were improperly instructed that the burden of proof was on defendants to prove the defense of

alibi. Toler v. State, 16 Ohio St. 583; Fife v. Comm. 9 Pa. 429; French v. State, 16 Ind. 670; Pollard v. State, 15 Miss. 410; Chappel v. State, 7 Colo. 92; Gibbs v. State, 1 Tex. App. 12; Otmer v. People, 76 Ill. 149; Howard v. State, 50 Ind. 190; Comm. v. Choate, 105 Mass. 451; State v. Storms, 94 N. C. 973; State v. Chee Gong, 16 Ore. 534; People v. Chun Heong, 86 Cal. 309; People v. Nelson, 85 Id. 421; State v. Shoyer, 104 Mo. 441; Mullens v. People, 110 Ill. 442; State v. Freeman, 100 N. C. 429; People v. Stone, 117 Ill. 35; Balkinship v. State, 55 Ark. 244; Walters v. State, 39 Ohio St. 215; Roodey v. Comm. 108 Pa. 500; Davis v. U. S., 160 U. S. 469.

JOHN P. VICTORY, solicitor general, J. H. CRIST, district attorney, and H. L. WARREN for the territory.

The special term of the district court had jurisdiction of the cause from the commencement of the trial to its conclusion. Laws 1893, chap. 61, sec. 20, p. 108; Laws 1891, chap. 90, sec. 3; Comp. Laws, secs. 531, 536, 543, 545, 552, 552a. See, also, Cooley's Const. Lim. [5 Ed.] 73; Follett v. Hall, 47 Am. Dec. (Ohio) 365; Hemingway v. Davis, 24 Ohio St. 150; Davis v. Messenger, 17 Id. 231; State v. Knight, 19 Iowa, 96–99; State v. Calendino, 8 Id. 288; Weaver v. Cooledge, 15 Id. 244; In re Dossett, 37 Pac. Rep. 1066; Server v. State, 105 Ind. 125; Samuels v. State, 3 Mo. 73; Servier v. Dille, 17 Id. 69; Railroad v. Hand, 7 Kan. 380; State v. Knight, 7 N. W. Rep. (Iowa) 16; Dunn v. State, 2 Ark. 229; Munzesheimer v. Fairbanks, 82 Tex. 351; Murray v. State, 17 S. E. Rep. (Ga.) 99; Smith v. N. P. Rd., 53 N. W. Rep. 173; Machine Co. v. McCaffrey, 38 N. E. Rep. 208; Casely v. State, 32 Ind. 62; State v. Montgomery, 8 Kan. 351; Cook v. Smith, 54 Iowa, 640. See, also, as to waiver, Railroad v. Power, 119 Mo. 269; Street v. Chapman, 29 Ind. 142; Croy v. State, 32 Id. 384; Murphy v. State, 97

Id. 579; Schlungger v. State, 113 Id. 295; Ard v. State, 114 Id. 542; Mannix v. State, 115 Id. 245.

That part of section 552, Compiled Laws, providing that special terms shall not conflict with regular terms is simply directory, and not mandatory. Mendum v. Comm., 6 Rand. 704; Lewin v. Dille, 17 Mo. 64.

Under an indictment charging murder in the first degree, a verdict finding defendant guilty as charged, is a sufficient finding in the first degree, without specifying the degree, and the jury is not authorized or required to assess the punishment, which under our statute is the duty of the court. Acts 1891, sec. 10, p. 151; Territory v. Romine, 2 N. M. 114; Same v. Yarberry, Id. 391; Kennedy v. People, 39 N. Y. 245; State v. Werse, 53 Iowa, 92; State v. Jennings, 24 Kan. 642; State v. Hooker, 17 Vt. 658; Hogan v. State, 30 Wis. 428. See, also, Whar. Crim. Pl. & Prac. [9 Ed.], sec. 760; People v. Murray, 10 Cal. 309; Davis v. Utah, 151 U. S. 266; Wiggins v. State, 1 S. Rep. 693; State v. Bullock, 13 Ala. 413; Buckley v. State, 2 Greene (Iowa), 162; State v. Walton, 62 Me. 106; People v. Clements, 26 N. Y. 193; Surratt v. State, 45 Miss. 601; Pickett v. State, 22 Ohio St. 405–410; Bish. on Crim. Proc. 325, 612.

While an indictment for murder must allege the time and place of death, this is for the purpose of showing the venue, and that the death occurred within a year and a day; and where these facts appear with sufficient certainty to exclude every other intendment, it will be held good, and always so after verdict. 2 Chitty, Crim. Pl. 737; Arch. Crim. Pl. 34, 381. See, also, Hardin v. State, 4 Tex. App. 355; Turpin v. State, 80 Ind. 148; State v. Huff, 11 Nev. 17.

As to note sent by witness Juan Gallegos to deceased, it was admissible as a part of the res gestae of the facts and circumstances about which the witness

testified. 1 Whar. Law Ev., sec. 259; 1 Greenlf. Ev., sec. 108; 100 Am. Dec. 49, and note, p. 51; Lander v. People, 104 Ill. 248.

The competency of the witnesses Nowell and Trujillo was a question of fact for the court to determine upon the examination of the witnesses on the voir dire. Butchers Co. v. Jones, 1 Esp. 160; Bosham v. Swingler, Id. 164; Rex v. Gisbum, 15 East. 57; Lummis v. Row, 10 Ad. & El. 606; 29 Am. and Eng. Ency. Law, 658. It was disclosed on the examination of both the witnesses on the voir dire that they were pardoned. 1 Greenlf. Ev., sec. 95; Howser v. Comm., 51 Pa. St. 332.

While the rule is a witness can not be contradicted as to any matters drawn out on cross-examination, which are purely collateral and in no way relevant to the issue, this rule does not apply to any facts immediately connected with the main subject of inquiry, with reference to which the witness may be contradicted. 1 Stark. Ev. [9 Ed.] 200, 203; Lawrence v. Lanning, 4 Ind. 194; Ware v. Ware, 8 Me. 42; Comm. v. Hunt, 4 Gray (Mass.) 421; Bank v. Smith, 19 Johns. 123; Chelton v. State, 45 Md. 564.

As to the action of the court in refusing to permit defendants to give testimony in answer to or contradiction of plaintiff's rebuttal testimony to defendant's alibi, the admission of such offers would have opened the door to interminable offers on both sides, and the admission or rejection of such evidence rested in the sound discretion of the court. Marshall v. Davis, 78 N. Y. 414, 420; Hastings v. Palmer, 20 Wend. 225; Rheinhart v. State, 14 Kan. 322; Ford v. Miles, 1 Hill, 300.

The burden of proof is on the accused to establish an alibi by a preponderance of evidence. Thomp. on Trs., sec. 2437; Comm. v. Webster, 5 Cush. 926; State v. Hardin, 46 Iowa, 623, 629; State v. Red, 53 Id. 69;

State v. Reed, 62 Id. 40; State v. Kline, 54 Id. 183; State v. Northrup, 48 Id. 583; State v. Hamilton, 11 N. W. Rep. 5; State v. Jennings, 81 Mo. 185; Garrity v. People, 107 Ill. 162; State v. Johnson, 91 Mo. 439; Ware v. State, 67 Ga. 349; Pellum v. State, 39 Ala. 28; State v. Nance, 25 S. C. 168; Underhill, Ev., sec. 249.

OPINION ON MOTION TO QUASH WRIT OF ERROR.

SMITH, C. J.—This case was brought up to this court from the district court of the county of Santa Fe by writ of error. It is now before us upon motion by the territory through its solicitor general, to quash the writ of error and affirm the judgment of the court below for the alleged reason that appeal is the only process by which criminal cases can be brought up from the district courts to this court for review.

The organic act authorizes the review of the judgment by writ of error. This motion presents the question: Are the judgments of the district courts of the territory of New Mexico, in criminal cases, reviewable in the supreme court by writ of error or appeal? The organic act vests the supreme and district courts with common law and chancery jurisdiction. Sec. 1868, Rev. Stat. U. S.

REVIEW of judgments of district courts by writ of error in criminal cases: stay of execution.

And provides that "writs of error, bills of exceptions and appeals shall be allowed in ALL cases, from the final decisions of the district courts to the supreme courts of all the territories, respectively, under such regulations as may be prescribed by law." Sec. 1869, Rev. Stat. U. S.

It is elementary that the mode employed at common law, for the review of common law cases, is by writ of error, and decisions in chancery by appeal. Hence, the territorial courts being vested with common law jurisdiction by the organic act, the decisions of the

district courts are reviewed in the supreme court, in common law cases, by writ of error, and in chancery cases by appeal.

At common law the review of a judgment in a criminal case could be by writ of error and in no other way. Rice v. Rex, Cro. Jac. 404; Rex v. Seton, 7 T. R. 373; Rex v. West Riding, etc., 7 T. R. 467; Reg v. Carlisle, 2 B. & Ad. 971; State v. Shepard, 37 Wis. 395.

Permission from the crown was, however, in criminal cases, always necessary to maintain the writ in England. This permission was granted as of right in misdemeanor, while in treason or felony it was a matter of grace from the sovereign, who could withhold or allow at pleasure, though there was manifest error in the record.

The reason assigned for this was that the felon had forfeited all he had to the crown, and the crown could exercise its pleasure whether or not to give it back. Rex v. Earberry, Fort, 37.

The method of procuring a review when this grace was extended was always by writ of error and in no other way.

In the United States, forfeitures not being one of the penalties visited upon the felon, the writ is awarded by the courts as of course wherever it would have been granted in England by fiat of the crown. Sec. 1362, 1 Bishop, New Crim. Proc.

Congress, in preserving to litigants the right of review by writ of error undoubtedly must have had in mind the writ of error as the same was employed by common law, because it conferred common law jurisdiction upon the court wherein it was to be made use of, and left it to our legislature to regulate the manner of taking and allowing the same.

This, our legislature has done by the enactment of section 2194, Compiled Laws, which provides: "The clerk of the supreme court shall issue a writ of error

to bring into the supreme court any cause finally adjudged or determined in any of the district courts, upon a praecipe therefor * * * at any time within one year from the date of such judgment * * *" And section 2199: "Hereafter no writ of error shall be allowed by the supreme court of this territory, except within one year after the rendition of the judgment on which said writ of error is based; and that said supreme court shall make rules for the government of the practice in writs of error in common law cases, which said rules shall not conflict with any of the laws in force in this territory."

The terms "writs of error" and "appeals," as they appear in the organic act, have a technical significance well known to the law. It is then provided that they "shall be allowed in all cases" and are guaranteed parties in all cases.

Something having definiteness and substance is secured to the court and to the parties before it by this language; and it is put beyond the power of the territorial legislature to deny, alter, or curtail. The jurisdiction is fixed by the organic act, the power to regulate the procedure is reposed in the legislature. It can not be contended that congress has, in one and the same form of expression, secured to the supreme court a certain jurisdiction and to parties certain rights, and given to the territorial legislature the power to make that jurisdiction nugatory and these rights unavailing.

This provision, with its imperative phraseology, intends nothing short of assuring to the appellant, not whatever the territorial legislature may be pleased to call an appeal, but an appeal known to chancery, and assuring to the plaintiff in error the writ of error with all the benefits growing out of, and incident to, such writ.

What congress had given, it has not authorized the territorial legislature to take away by regulations.

The allowance of the writ of error may be regulated by the legislature, as has been done; but these regulations must not derogate from the nature and substance of the thing given it to regulate. Whatever the territorial legislation on this subject is, or may have intended, it can not have taken from the supreme court jurisdiction to review cases cognizable at common law by writ of error.

The power given by the organic act to the legislature to regulate writs of error and appeals is not operative to enable the legislature to limit or to regulate what is fixed and assured by the same organic act.

The power to regulate does not confer power to abrogate. Our legislature has not, however, made any attempt to interfere with or deny the jurisdiction conferred upon the supreme court by the organic act, but on the contrary has regulated such jurisdiction by sections 2193 and 2194, Compiled Laws. In providing for appeals from final judgments in criminal cases, it has merely given a concurrent remedy.

In United States v. Horace C. Gibson, 1 Idaho, 364, the court reached the conclusion that a common law action could not be re-examined on appeal, but must be brought up by writ of error, in the following opinion:

"The courts of this territory are created by the organic act, and their jurisdiction and powers must be ascertained by the provisions of said act and the laws of the territory passed in pursuance thereof. Both the district and supreme courts are by the express terms of the act clothed with chancery and common law jurisdiction; and the legislature has no authority to abridge such jurisdiction, nor has the legislative assembly made any attempt so to do * * *. How shall this appellate jurisdiction be exercised? The organic act, in very plain and positive language, declares that writs of error, bills of exceptions and appeals shall be allowed

in all cases from the final decisions of the district courts to the supreme court, under such regulations as may be prescribed by law. Congress, therefore, has not delegated the power to the legislature to say in what cases writs of error and appeals may be allowed, but has emphatically declared in language that is plain, that they shall be allowed in all cases. The act, however, does not prescribe the mode in which they shall be allowed, but expressly provides that they shall be allowed under such regulations as may be prescribed by law, thus giving to the legislature the power to prescribe the regulations as to the manner in which they may be taken and allowed."

"The declaration of the act is that writs of error, bills of exception, and appeals shall be allowed. These words have a technical and well understood meaning. 'Writs of error' are known to common law proceedings, but an appeal is not; but writs of error and appeals are the modes pointed out by congress whereby common law, equity, and admiralty causes may be reviewed and re-examined in the supreme court; and when congress used these words in the organic act, it must be considered that they used them in accordance with the sense that had been given them by the supreme court of the United States. There is no doubt but that they were so used and intended to be understood, in the same section, in providing for the writs of error and appeals from this court to the supreme court of the United States."

"If this be the sense in which these words were used, it follows that the true interpretation of that clause of the organic act is this—that writs of error and bills of exceptions shall, in suits at common law, be allowed and taken, and appeals in equity and admiralty cases shall be allowed from the district to the supreme court; and that the power is conferred upon the legislature to regulate the manner and prescribe the rules of practice in taking and allowing them."

II. Remedy by writ of error is concurrent with remedy by appeal.

In criminal cases the common law, as recognized by the United States and the several states of the union, shall be the rule of practice and decision. Sec. 2484, Comp. Laws.

Under the common law, as we have already seen, the writ of error was the method by which a judgment in a criminal cause could be reviewed.

By providing that the common law, as recognized by the United States and the several states of the union, should be the rule of practice and decision in the territory, the legislature has vested the supreme court with jurisdiction to review judgments in criminal cases by writ of error.

In Barrett v. State, 36 Mo. 198, the court say: "Although the remedy by appeal in civil cases takes away the remedy by writ of error, by implication, as a general rule, yet in criminal cases the reason for the rule ceases, and there it does not apply * * *. His remedy for appeal would often be more onerous than that by writ of error to reverse an erroneous judgment, and, therefore, it is that his right to proceed by error is not taken away or impaired by giving him the right of appeal." Citing Cook, Pet., 15 Pick. 239; Thayer v. Com., 12 Metc. 9; Co. Lit., 288; 3 Blacks. Com. 407.

In United States v. Plumer, 3 Clifford, 1, at page 58, Judge CLIFFORD said:

"At common law the writ of error would lie in criminal as well as in civil cases, and that the rule was just as applicable to misdemeanors as the case at bar (murder), which was declared by act of congress to be a felony."

In Sanders v. State, 85 Ind. 318, at page 257, the court say:

"It is held in well considered cases that although there is a statute governing proceedings in criminal

cases, the writ is not abolished unless the statute specially or by implication abrogates it. This is so held, with respect to writs coram nobis, by MARSHALL, C. J., in Strode v. Stafford, 1 Brock., U. S. C. 162. In speaking of the claim that the writ coram nobis can not exist under the statute, COWEN, J., said in Smith v. Kingsley, 19 Wend. 620: 'There is no statute expressly and in terms repealing its power, nor any which does by necessary implication. Mere silence or omission to regulate proceedings upon such a writ will not operate as a repeal. The power, therefore, remains as at common law, except as to the mere form coram nobis resident, because the fiction of the record, remaining before the King himself, is gone. We, therefore, have lost the name of the writ, but nothing more.' "

In many of the states the common law writ of error is recognized as forming part of the law. Holford v. Alexander, 12 Ala. 280; Adler v. State, 25 Ark. 517; McKinney v. Western, etc., 4 Iowa, 420; Hawkins v. Bowie, 9 Gill. & J. 428; Fellows v. Griffin, 9 Sm. & M. 362; Calloway v. Nifong, 1 Mo. 223; Reid's Adm'r v. Strides, Adm'r, 7 Grat. 76; Dows v. Harner, 6 Ohio, 518; Wood's Exec. v. Caldwell, 34 Penn. St. 92.

III. Our statute amply provides for a review of the judgment by writ of error.

Kearney's code, promulgated by General Kearney in 1846, and which was by the legislature of 1850 adopted, contains the only provision for appeals from final judgments in criminal cases. These provisions were incorporated into the compiled laws of 1884, as sections 2468, 2469, 2470, 2471, 2472 and 2473.

By section 2469 appeals are allowed from final judgments rendered upon any indictment, to the supreme court, if applied for during the term at which the judgment was rendered. Appeals only lie from such final judgments if allowed during the term at which the judgment was rendered. After the term has expired no appeal can be taken.

In 1880 the legislature passed a comprehensive act, regulating the mode of taking appeals and suing out writ of error. This act is compiled in sections 2193 and 2194 of the Compiled Laws of 1884, and is in conformity with the organic act which gives the legislature power to regulate the writ of error and appeal. By that act it was provided that ALL CAUSES either in law or equity, finally adjudged or determined in the district court, may be removed into the supreme court of the territory for review either by appeal or writ of error. Sec. 2193, Comp. Laws 1884. The next section, 2194, regulates the practice on appeal and writ of error, and provides that the writ of error may be sued out within one year from the date of the judgment brought into the supreme court. How could the language of section 2193 be made plainer for the purpose of providing for the review of judgments in criminal cases by writ of error? ALL CAUSES, either in law or in equity, may be removed into the supreme court for review, either by appeal or writ of error. Criminal cases or causes at law as distinguished from causes in equity and as all causes at law may be removed into the supreme court by writ of error, it follows that criminal cases can be so reviewed.

The legislature of 1884 recognized the fact that judgments in criminal cases could be reviewed either by appeal or writ of error, under the laws as they then existed in the territory, and enacted what is compiled as section 2201 of the Compiled Laws of 1884, viz.:—

"Appellants or plaintiffs in error in criminal cases, removed into the supreme court of the territory for review, shall not be required to print the record, nor any part thereof," etc. See Kidder v. Bennet, 2 N. M. 37.

In Missouri, 2 Wagner's Stats., section 13, there is a provision "that the state in any criminal prosecution shall be allowed an appeal only in the cases and under the circumstances mentioned in the next succeed-

ing sections." Notwithstanding this provision, it was held in State v. Cunningham, 51 Mo. 479, that "when a motion to quash an indictment is sustained in the lower court, the state can bring the case to this court by writ of error or appeal."

The solicitor general in his brief, at page 8, seems to argue that section 2193 of the Compiled Laws does not apply to criminal cases, because no provision for supersedeas or stay of execution is therein contained. This contention is wholly without merit. At common law, a writ of error is not a supersedeas so as to discharge from custody, but in capital cases it operates to stay execution. Sec. 783, Wharton's Crim. Prac. & Pro.

A writ of error is a supersedeas by implication. If the record of the judgment is removed by writ of error, it is necessarily a supersedeas for the record being removed it is impossible for the justices of the court in which it was to award execution. 9 Brac. Abr. Supersedeas, p. 284.

In the Bishop of Ossory's case, 3 Crooke, 534, it was held that "a writ of error is a supersedeas, although the record itself is not removed to the court where errors are brought, but a transcript only."

The right of appeal in a capital case is necessarily coincident with that of a stay of execution, until that appeal can be heard. State v. Pagels, 92 Mo. 300.

In Kitchen v. Randolph, 93 U. S. 86, the court say: "At common law, a writ of error was supersedeas by implication."

Under the statutes and the authorities it is plain that the judgment in this cause may be reviewed by writ of error.

The motion to quash the writ of error is therefore overruled.

COLLIER and BANTZ, JJ., concur.

OPINION ON THE MERITS.

SMITH, C. J.—At the June term, A. D. 1894, of the district court for the county of Santa Fe, Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia were indicted for shooting and killing one Francisco Chavez, on the twenty-ninth day of May, 1892, in the county of Santa Fe, and territory of New Mexico. On March 18, 1895, a special term of the said district court was duly called by the Honorable N. B. Laughlin, associate justice of the supreme court, and judge of the First judicial district of New Mexico. Judge Laughlin, deeming himself disqualified to preside at the trial of the said defendants, called in to sit for him Hon. H. B. Hamilton, associate justice of the supreme court, and judge of the Fifth judicial district of the territory of New Mexico, and thereupon Judge Hamilton, during the said special term, commenced the trial of the said parties, to wit, on the twenty-third of April, 1895, and continued the same until the twenty-ninth day of May of the same year, when the jury returned a verdict finding the accused guilty as charged in the indictment. A motion was thereupon made for a new trial and an arrest of judgment, which said motions were duly argued, and, after full consideration, were overruled, and the defendants were thereupon sentenced by the court to be executed on the tenth day of July, 1895. An appeal was thereupon taken by the accused to this court by writ of error from the district court, and the case is now before us for review and determination upon numerous points of error alleged to have been committed during the progress of the trial.

In the first place, it is contended that the special term of the court at which the appellants in error were tried expired by operation of law on the sixteenth day of April, 1895, and could not legally have been prolonged by the

SPECIAL term: continuance beyond time of regular term: validity.

action of the presiding judge. It appears that a regular term for a district court in the county of San Juan was fixed by territorial statute to commence on the third Monday of April, 1895, and it is insisted that a limitation was thus imposed upon the duration of the special term commenced in Santa Fe on March 18, 1895; that the terms of court for one county can not encroach by extension upon the courts of other counties of the district; that in theory of law a term of court begins on the day designated by statute for its commencement, and ex vi termini other courts in the district at the same time are prohibited. Such construction might obtain in this territory if statutes did not exclude it. Section 543 of the Compiled Laws directs courts to be held in the different counties at the times fixed by law, and authorizes their continuance until adjourned by order of court. It is manifest that it was intended by this provision to impose a duty and to confer a discretion, and it would seem that, if the exercise of the one should render impracticable the discharge of the other, the discretion should prevail. The interest of the public is the consideration that has induced many courts to the adoption of the doctrine that a term in progress in one county must be arrested by the arrival of the time fixed for a court in another county in the same district, and a judge animated by due regard for public weal, and in his opinion legally possessing absolute power as to the duration of the terms of his courts, might in sound judgment continue one and abandon another. The special term in question commenced March 18, 1895, and it can easily be conceived by this tribunal that the trial judge, in the exercise of his discretion, wisely regarded it more judicious to conclude the case, that had consumed weeks, at the cost of thousands of dollars, than to abandon it for a term in a county of limited population and proportionate litigation. Absence of provision for such an

emergent contingency would be a grave casus omissus.

It is further urged that, as the statute (Comp. Laws, sec. 552) provides that special terms shall not conflict with regular terms, the special term at Santa Fe was necessarily terminated by the regular term constructively existing in San Juan on the third Monday of April, 1895. But said section merely declares against a conflict, and does not declare the cessation or illegality of the proceedings of the seemingly conflicting special term, and it can not, in any view, be legitimately maintained that the legislature by such direction intended a mandate, and the vitiation of all proceedings in disregard of it. By section 543, special terms are, as to their length, as absolutely in the control of the presiding judge as are regular terms; and section 552 authorizes special terms, not only in the discretion of the judge in the furtherance of justice, but without any condition or restriction as to duration. It may, therefore, be logically concluded that the authority to continue terms until adjourned by order of court was deliberately designed in the interest of the public to prolong the regular term, if needed, and to afford special terms without limitation in lieu of regular terms lapsed, and in furtherance of justice. It must also be presumed rationally that the legislature, in attaching by section 552, a condition to the authority to hold special terms, contemplated an actual, and not a constructive, conflict, and did not design that a term being held should be annulled by one that could not be held. Section 2, chapter 61, of the statutes of 1893, required the respective counties to provide for the expenses of their district courts, and practically inhibits terms in counties in which there are no funds. It is experience that a frequent consequence of this system has been the impossibility to hold courts in some of the counties at the time fixed by statute, and, as it is a rule of law that

public officers are presumed to perform their official duties, and no court was held in San Juan on the third of April, 1895, it can be legitimately concluded that there were no funds for a term there, and that the judge of the district, with knowledge of this deficiency, appointed a special term in Santa Fe, with the intention and expectation that it would be continued as long as required in the furtherance of justice. It is not conceivable that a court allowed by law and in session could be terminated by a term not only not in esse, but that could not exist; the one was a court in fact, the other a court by construction only, and between them there could not be a practical conflict. It seems, therefore, that the territorial statute sustained the judge in convening the special term, and in continuing it beyond the times fixed for the regular terms for the counties of San Juan, Rio Arriba, and Taos for the spring of the year 1895.

Next is the impeachment of the indictment as not containing the essential averments to confer jurisdiction upon the trial court. It is contended that the allegation that Francisco Chavez instantly died of the mortal wounds inflicted upon him by the plaintiffs in error does not with sufficient distinctness specify the time and place of his death to charge that he died in the county of Santa Fe within a year and a day from the date of the killing. It is difficult to conceive that an instant consequence of an act does not exclude conception of delay in its occurrence, and does not constrain the conclusion that it was effected on the spot, at the place where it was caused. If a deed produces results the moment it is done, they must happen where it was done. Fire applied to powder produces instantaneous explosion, and no doubt of the time and place of the event is possible. There being no intervention of time between the cause and the effect, there can be no question as

HOMICIDE: indictment: pleading: sufficiency.

to the place where the latter ensued from the former.

That the accused were apprised that they were on trial for the murder of Francisco Chavez on the night of the twenty-ninth of May, 1892, in the county of Santa Fe; that it was proved that Francisco Chavez was killed then and there; that the accused admitted that they were then in the county of Santa Fe; that they defended themselves against the charge of having murdered Francisco Chavez on the night of the twenty-ninth of May, 1892, by their alibi, claiming that they were not at the place of the killing on said twenty-ninth of May, 1892; and that their acquittal would have protected them against a second prosecution for the same crime. (See Comp. Laws, section 675),—are facts that can not be controverted, and effectually dispose of the pretension that the phraseology of the instrument upon which they were arraigned and tried was not sufficiently specific to indicate the venue of the alleged offense. Many authorities have been submitted to sustain the contention that venue and time are not legally laid by the averment of instant death; that it does not exclude the possibility of the death a year and a day out of the jurisdiction, where and after the wounds were given, but, with due respect for the tribunals that have so adjudicated, we can but regard their conclusions as tending to contract the natural import of language, and strain it from its substantial signification. While courts could abstain from the encouragement of departure from the phraseology of forms almost sacred from protracted adherence to them, they should not pursue such conservatism to the excess of servility. Synonyms should be duly regarded, and words so interpreted that their natural meaning should not be destroyed. Innovations may be unwise, but the antagonism to them that will preclude the use of equivalent expressions would be even more pernicious. In recognition of these principles, less narrowness is obtaining

in the construction of pleadings, and, while certainty in their allegations is required, strict conformity to wonted verbiage is not exacted. "Instantly," say lexicographers,—those who define it etymologically, and those who give its legal meaning,—implies "without any intervention of time," "allows not a particle of delay," "marks an interval too small to be appreciated;" and that Francisco Chavez, in dying "with an interval too small to be appreciated" between the shots he received and his death, died at the place where he was shot, seems an irresistible conclusion. That an event that transpires instantly can be remote from its cause seems a contradiction not entitled to any consideration. That there can be, between an occurrence and its creation, no intervention of time, not a particle of delay, not an appreciable interval, and yet be doubt about the place of its accomplishment, seems an impossible conjecture. An injunction to do instantly is partially obeyed by the act to forthwith proceed to do it, though it may never be done; but, if accomplished without intervention of time, without a particle of delay, the interval between the order and its execution being not appreciable, it is done instantly.

In Hardin v. State, 4 Texas App. 371, the indictment which charged that "Charles Webb, of mortal wounds so given as aforesaid, instantly did die," was pronounced sufficiently certain of the time and place of his death. The court regarded the words "so given" as suggestive, and we may with equal propriety attach consequence to the description, "said mortal wounds," contained in the indictment under consideration, as they can refer only to wounds recited as having been inflicted upon Francisco Chavez on the night of the twenty-ninth of May, 1892, and of which he "instantly died."

In Turpin v. State, 80 Ind. 148, an indictment that contains in the allegation as to death neither the words

"instantly" nor "then and there," is sustained, as the venue and time were once stated. This opinion is based upon statute, but the court declared that the equivalent of "then and there" would, in any contingency, be sufficient.

In State v. Huff, 11 Nev. 21, the court, in considering the objection that the indictment did not contain sufficient certainty as to the place of the crime and the day of its commission, say: "It may be said, with reference to this particular case,—and it will be a sufficient answer to appellant's objection, if there were none other,—that the indictment does show, by fair and reasonable intendment, that O'Reilly was stabbed and died on the same day. It says the defendant stabbed him on that day, and killed him on that day. Therefore he must have died on that day. The evidence, we believe, shows that he did not die until the next day, but this was an unimportant variance, and the question is as to the sufficiency of the indictment, not as to the conformity of the proof." It was further decided in this case that failure to demur to the indictment for the defect that it did not declare that the death occurred within a year and a day from the perpetration of the act which produced it was a waiver by the defendant.

In Comm. v. Bugbee, 4 Gray, 206, in an indictment for an assault, the allegation that the assault was then and there made was sufficient without the repetition of "then and there" before the charge, "did actually strike." "There might have been, with the words 'then and there,'" said Chief Justice EWING, in a similar case, "greater deference to tautology, but not thereby a more explicit or intelligible averment." Says METCALF, J.: "Objections like that now before us were never held valid in prosecutions for misdemeanor, but only in favorem vitae in indictments and appeals of death." 3 Hale, P. C. 178; 2 Hawk. P. C., chap. 23,

sec. 28; 7 Dane. Abr. 272. "Even in capital cases," continues Judge METCALF, "they have been deemed by the most eminent English judges as among 'the unseemly niceties' by which the law is blemished and reproached." 2 Hale, P. C. 193; 2 Gabb, Cr. Law, 198, 199. "And this court," further declares Judge METCALF, "in the case of Comm. v. Barker, 12 Cush. 186, 187, decided that an indictment for murder was sufficient which alleged that the defendant, at Worcester, in the county of Worcester, on the second of January, 1853, with a certain axe, feloniously did strike M. B., giving unto the said M. B., then and there, with the axe aforesaid, feloniously, willfully, and with malice aforethought, one mortal wound;" that the words "then and there" needed not to be repeated before the allegation of the mortal wounds, because, notwithstanding the English decision to the contrary, it was deemed most clear that no one upon reading the indictment could fail to understand that the mortal wound was alleged to have been given on the day named in the indictment in Worcester. Says the judge further: "We are of the opinion that a charge expressed in a plain, intelligent, and explicit manner, and in the accustomed legal phraseology, is sufficient to warrant a judgment against the party thus charged, whether that charge be a capital offense or a misdemeanor." See, also, Comm. v. Doherty, 10 Cush. 52.

In Ball v. U. S., 140 U. S. 136, 11 Sup. Ct. 767, it is declared that "all the essential ingredients of the offense charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defense, and avail himself of his acquittal or conviction against further prosecution for the same case." The indictment in this case was sustained as to time, though it contained no averments upon that point, upon the ground that it was observed from the

indictment that it was returned before the lapse of a year and a day from the time it was alleged in the indictment the party was assaulted; but no place of death was averred, and there were no data to supply the omission, and the indictment was accordingly remanded, with directions that it should be quashed.

MURDER in first degree: indictment: pleading: sufficiency.

Satisfied that the time and place are stated with sufficient particularity and exactness in the indictment under consideration "to advise the appellants in error of the nature and cause of the accusation against them" (to use the words of section 673, Comp. Laws), and for which they were arraigned and tried, we will consider the degree of the crime specified. The indictment alleges that the accused unlawfully, feloniously, willfully, purposely, and with express malice aforethought did shoot and kill Francisco Chavez, and it is urged that such charge neither expressly nor by implication is an accusation of murder. The killing is admitted, but that the allegation of the crime charged is of greater degree than assault is gravely denied. The indictment charges that Francisco Chavez was killed as above recited, but the accused claim this is not an accusation that he was murdered. That he died instantly is the statement of the indictment, and yet the pretension is that the accused were arraigned, not for the crime of killing him, but for making an assault upon him. We do not appreciate any such representation, as the indictment, in our conception, embodies in its terms all the elments that constitute murder, and is so distinct and comprehensive that it excludes lesser crime than the most flagrant,—that of murder in the first degree. Murder is defined by our statute as the unlawful killing of a human being with malice aforethought, express or implied; and express malice is described as "the deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances

capable of proof." Murder in the first degree is classified by statute, and in the enumeration is included a killing perpetrated from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being. The offense for which the accused were tried is that they unlawfully, feloniously, willfully, purposely, and with express malice aforethought did kill and murder Francisco Chavez, and yet it is insisted that there is the omission of the elements of deliberation and premeditation in this accusation, essential to constitute a charge of murder in the first degree. We might attribute to willfulness that malicious intent, to purpose that positive design, that would involve a contemplation without mature consideration; but we will not resort to construction when the statute is so emphatic as to render it superfluous. Express malice is defined to be "that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." Let us then substitute for the adverbs employed in the indictment their equivalents according to the lexicographers of legal phraseology, and for the words "express malice aforethought" the definition as given by our statute. "Willfully," in its most moderate signification, is "intentionally;" "purposely" is "designedly;" and "express malice" is, by the statute, "the deliberate intention to take away the life of a fellow creature;" and if for these adverbs there were inserted in the indictment their synonyms and the statutory definition for the phrase "express malice," the charge would then run that the accused unlawfully, feloniously, intentionally, and designedly shot Francisco Chavez with a deliberate intention to take away his life. If such legitimate paraphrasing does not demonstrate that the charge made in the indictment is that of murder in the first degree, it would be difficult to use phraseology to constitute such an accusation.

A deliberate intention unlawfully, feloniously, willfully, purposely to take away life includes all the elements of the crime of murder in the first degree, and by its terms excludes all conception of lesser crime as their signification. There can not be the absence of design to effect death, nor the heat of passion in the perpetration of the crime, where deliberate intention exists; and we can, therefore, but conclude that the indictment exclusively charges murder in the first degree, and no lower crime. It follows, therefore, that the verdict of the jury that the accused are "guilty as charged in the indictment" is responsive to the indictment, and is a finding that they, in killing Francisco Chavez, committed murder in the first degree.

In People v. Enoch, 13 Wend. 159, it was charged that the defendant feloniously and of malice aforethought killed his wife, the words "with premeditated design" being left out, and a general verdict of guilty was returned, and judgment upon the same for the execution of the accused was sustained.

We will now address ourselves to the defense presented by the accused. They deny that they were guilty of the killing of Francisco Chavez, and undertook to prove that three were at the house of Seferino Alarid, and the fourth at his home, at the time of the shooting; and the court instructed the jury that it was incumbent upon them to establish this claim by a preponderance of the evidence, but not beyond a reasonable doubt, and added: "If, therefore, after consideration of all the evidence in the case, as well that in relation to the alibi offered by the defendants as that offered by the territory, you have a reasonable doubt as to whether the defendants were at the place where the crime was committed, or were in some other locality, away from the place of the homicide, you should give the defendants the benefit of that doubt, and find them not

MURDER: alibi: onus: reasonable doubt: instruction.

guilty." This instruction is objected to as erroneous, in that it announces that the obligation to establish the alibi is upon the defendants. Many respectable authorities have regarded alibi as an affirmative defense, but we do not feel called upon to pass upon this view in this case, as the instruction given by the court distinctly announced to the jury that if they entertained any reasonable doubt, after considering all the evidence of the defendants in relation to the alibi, offered by them, whether they were at the place of the homicide, they should give the benefit of that doubt to the defendants, and find them not guilty. This imposes upon the prosecution the obligation to demonstrate beyond a reasonable doubt that the accused were at the place where Francisco Chavez was killed, and gives them the benefit of their testimony to create in the minds of the jury a reasonable doubt as to their presence then and there. The accused are relieved by this instruction from any responsibility to establish by a preponderance of evidence that they were at the house of Seferino Alarid, or elsewhere, at the time of the perpetration of the crime, as the direction to acquit them if any reasonable doubt had been established by their evidence, or all the evidence in the case, as to their whereabouts at the time of the killing, is peremptory. Leonardo v. Territory, 1 N. M. 291.

We will now consider the objection to the court's action in the admission and rejection of testimony.

One Juan Gallegos, by his own admission an accomplice in the conspiracy to take the life of Francisco Chavez, represented that he was approached by one Hipolito Vigil with a proposition to assassinate the said Chavez; that the details of the projected crime were discussed between him, the said Vigil, and one of the accused, Francisco Gonzales y Borrego; that they informed him that Antonio Gonzales y Borrego and Partricio Valen-

MURDER: evidence: admissibility.

cia, two of the defendants, were in the agreement; that their object was to remove Francisco Chavez because he was a prominent man, of great strength with his party, to which they were antagonistic, and which they wished to destroy in the county of Santa Fe. He, seemingly to them, acquiesced in their proposition, but, upon reflection, having no reason to murder said Chavez, he determined to put him upon his guard, and accordingly sent him a short note on January 16, 1891 (which said note it was proved was found among the papers of Francisco Chavez after his death, and was identified by the said Juan Gallegos on the stand); that afterward, to avoid importunity from his accomplices, to cooperate with them in the assassination of Francisco Chavez, and from fear of them as members of the "Button Society," under apprehension that they would become cognizant of his betrayal of them, he went to Colorado, where he was residing when he heard of the death of Chavez. The elements of truth in this statement are manifest. One of the counsel of the accused stated the existence of the secret "Button Society" for political purposes, and declared himself a member of it, and that Francisco Chavez was assassinated by the parties who petitioned the witness to unite with them in the perpetration has been declared by the jury's verdict and the court's judgment. It can not be seriously contended that the declarations of the accused were not properly admitted against them, whether Francisco Chavez was killed in pursuance of the conspiracy revealed by the witness or not. The note was no less a declaration of Juan Gallegos than the oral statements, and the supreme court of Illinois in Lander v. People, 104 Ill. 248, has declared "that acts and declarations so intimately connected with the principal event which they characterize as to be a part of the transaction itself, and which clearly negative any premeditation or purpose to manufacture testimony are

admissible." But there seems no reason to deny a continued conspiracy between this clan, and, in such event, the declarations of one of them in connection with its object or its purpose will be recognized as the declaration of all. "A conspiracy is not destroyed by connection at a subsequent time of new parties therewith, as a new party, agreeing to the plans of the conspirators, and coming in and assisting them, becomes one of them." Wright, Cr. Consp. [Carson's Ed.] 129, citing U. S. v. Nunnemacher, 7 Biss. 111, Fed. Cas. No. 15902; People v. Mather, 4 Wend. 229. The note was the act of one of the conspirators during the existence of the conspiracy. It was a declaration of the existence of the conspiracy by one of the coconspirators, and was properly submitted to the jury in connection with all the evidence on the subject. Judge Morrow, in U. S. v. Cassidy, 67 Fed. Rep. 703, announces that: "Any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties. This rule, you will understand, applies to the declaration of a coconspirator, although he may not be under prosecution, his declarations being equally admissible with those of one under indictment and prosecution." Bish. New Cr. Proc., sec. 1248, cl. 2, says that: "On its being shown that one or more persons were acting in concert with the defendant about the thing in question, all with a common object, declarations during its progress by any one or the other, whether present or absent, may be given in evidence against the defendant." It was in the sound discretion of the judge of the trial court to admit this note as an accompanying act in connection with the combination shown, and the exercise of his authority is not reversible on appeal. Wiborg v. U. S., 163 U. S. 632, 16 Sup. Ct. 1127. Says the supreme court of the United States: "That much discretion is left to the trial court

in the admission of such evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 126.

We do not deem it necessary to consider seriously the objection to the competency of Ike Nowell and Porfirio Trujillo as witnesses. The former was convicted of a crime expressly designated as a misdemeanor by the United States statutes, and subjected to punishment in the penitentiary. Hard labor was not authorized by the statute, and, unless such penalty be attached to the commission of a crime under the federal laws, it is not an infamous offense. Again, adultery is not an infamous offense in this territory, as there is no statute so characterizing it, and its degree is here as at common law, under which it was only a misdemeanor. Porfirio Trujillo was restored to the privileges of citizenship by competent authority, according to his own sworn declaration, and the official records of the executive department sustained him. Having lost one of the pardons, and not having the other with him, it was altogether legitimate to show by the territorial archives that they had been issued to him.

WITNESS convicted of misdemeanor: competency of testimony.

Another contention is that the court erred in permitting the inquiry of the defendants as to whether they were on the streets of the city of Santa Fe, west of the Cathedral, between noon and 7 o'clock of the twenty-ninth day of May, 1892, as it is claimed that their presence during that interval was not material. The defendants replied that they were not west of the Cathedral in the city of Santa Fe at any time of the afternoon of the twenty-ninth day of May, 1892. It is a well-settled rule that a witness can not be cross-examined as to any facts which are irrelevant or collateral to the issue

MURDER: alibi: cross-examination of accused: judicial discretion.

merely to contradict him, but Starkie on evidence declares that "this rule does not exclude the contradiction of a witness as to any facts immediately connected with the inquiry." The defendants created the connection and the materiality of their whereabouts immediately before 7 o'clock by selecting that as the hour from which to account for themselves during the night, as the probability that they were not strictly accurate must be recognized as absolutely rational. It might have been significantly important to have located these defendants between the hours indicated, as it is easily conceivable that, had it appeared that they were seeking weapons, or cleaning them, it would have, in view of all the circumstances of this case, suggested that they were preparing for a shooting. In Boyle v. State, 105 Ind. 469, 5 N. E. Rep. 207, the court say: "In this instance the accused, when on the witness stand, had given an account of his movements upon a day named, and it was proper to go fully into the subject upon cross-examination, and the state was not confined to the particular period of time designated in the questions asked on direct examination." In Thomas v. State, 103 Ind. 419, 2 N. E. Rep. 820, the court say: "Where a party voluntarily takes the witness stand, and makes a broad denial of the offense charged, whether that denial be in general or specific terms, much latitude should be allowed in the cross-examination. Here appellant's denial put in issue all of the testimony adduced in support of the state's case. If his testimony was true all that in favor of the state was either ignorantly or willfully false." But, in any contingency, it was in the discretion of the trial court to pass upon the admissibility of such testimony, and we will not review its action. Say the court in Disque v. State, 49 N. J. Law, 249, 8 Atl. Rep. 282: "The extent of the cross-examination of a witness into pertinent facts, not touched by the direct examination, is a matter resting

entirely in the discretion of the trial court. Since the passage of the statutes capacitating parties as witnesses, it has been the general practice, both with respect to civil and criminal procedure, to permit such testifying party to be cross-examined as to the whole case; and such judicial action, being founded in discretion, is not a matter for which error can be assigned." Say the court in the case of People v. Clark, 8 N. E. Rep. (N. Y. App.) 38: "The extent to which he may be cross-examined on matters irrelevant and collateral to the main issue, with a view to impeaching his credibility, necessarily rests in the sound discretion of the trial court." See, also, State v. Pfefferle, 12 Pac. Rep. (Kan. Sup.) 406. The jury has found that the defendants were, beyond a reasonable doubt, at the bridge where Francisco Chavez was shot and murdered; and doubt whether they were at any point on San Francisco street during that day, before the killing, may have existed in the minds of the jury without affecting the final conclusion that they were at the place of the homicide.

The sixth assignment of error by the court, it is alleged, was the admission of testimony tending to show that the defendants were at the saloon of J. V. Conway, in Santa Fe, on the evening of the killing of Francisco Chavez, and the exclusion of evidence by the defendants to the effect that the witnesses who swore they saw the defendants in said saloon were not there themselves during the said evening. It was admitted in the argument that the evidence objected to was admissible if it tended to show that the defendants were at the said saloon at 7 o'clock, or later, that night, before the killing of Francisco Chavez; and it appears from the record that the hour when they claimed they saw said defendants was not specified, but was stated to have been at sundown, which at that season of the year occurred after

MURDER: admissibility of testimony: judicial discretion.

7 o'clock. Such evidence, as rebuttal of the defense of the accused, it would have been error to have excluded from the jury, and, as the accused had already had the opportunity to testify in chief that they were at 7 o'clock in the house of Seferino Alarid, it would have been needlessly cumulative to have permitted them to repeat themselves. These defendants had located themselves from 7 o'clock until after the killing of Chavez. Other witnesses gave statements conflicting with theirs, and, if still others were allowed to contradict the last, an interminable counter cumulation would have resulted; and we do not believe it either the duty or the policy of courts to permit such prolixity in their proceedings. But, in any event, the trial judge must be allowed a sound discretion in such matters, and as we do not perceive any abuse of its exercise in this instance, we do not deem it incumbent upon us, or legitimate for us, to reverse his action. Our concluding remarks in the paragraph immediately before that next preceding we here repeat.

The eighteenth assignment is that the court erred in permitting the territory, on cross-examination of the defendants Francisco Gonzales y Borrego and Antonio Gonzales y Borrego, to interrogate said witnesses as to how they had killed Juan Pablo Dominguez a few days after the death of Francisco Chavez, and as to the killing of Silvestre Gallegos by Francisco, and his indictment therefor. It can not be pretended that the evidence of the defendants contributed to the conclusion reached by the jury that the said defendants were at the killing of Francisco Chavez, as the jury, having been instructed to give them the benefit of any reasonable doubt as to their participation in the homicide, and acquit them, must have ascertained their verdict upon testimony in contravention of that of the accused. It is

MURDER: cross-examination of defendants: impeachment: judicial discretion.

immaterial whether Francisco Gonzales y Borrego and Antonio Gonzales y Borrego killed one Juan Pablo Dominguez after the death of Francisco Chavez, or at all, or whether Silvestre Gallegos was killed by Francisco Gonzales y Borrego. They might have been shown guilty of such crimes, and yet not have imperiled their defense of alibi, if they had been able to excite by the many witnesses other than themselves, whom they introduced to support them, a reasonable doubt as to their presence at the killing of Francisco Chavez; and, if it was error to admit such inquiries, it was not such a mistake of discretion as to require review, for "the asking of incriminating or disgracing questions is a matter largely in the discretion of the court, and, where no material injury is thereby done to either party, the refusal of the court to order such questions stricken out will not be reversible error." Section 2087 of the Compiled Laws authorizes the impeachment of the credit of a witness by evidence of his bad moral character, and the present tendency is to regard all facts as relevant which will enable the jurors to decide to what extent the testimony of the witness can be relied on. Accordingly a witness may be asked with a view to show his character for truthfulness as to specific facts, not too remote in time, which may tend to disgrace him, and counsel will be bound by his answers. Underh. Ev., p. 517. Say the court in Territory v. O'Hare, 44 N. W. Rep. (N. D.) 1008: "We hold that the right of cross-examination as to outside matters of fact, which affect the general character of the witness, and tend to degrade him and affect his credibility, is, within the limits of sound judicial discretion, a salutary rule." In Roberts v. Comm., 20 S. W. Rep. (Ky. 1892)267, it was announced proper, in a prosecution for murder, in order to discredit a witness for the state, to ask him if he had not been indicted for robbery and confessed the crime, as it was designed

to affect his credibility. For the same reason it was declared in State v. Miller, 13 S. W. Rep. (Mo. Sup.) 832, that it was not error to ask a witness whether he had been in the penitentiary two or three years. In People v. Casey, 72 N. Y. 393, the prisoner was a witness in his own behalf, upon the charges of assault, and the counsel for the people, upon cross-examination, put questions to him as to other altercations in which he had been engaged, and other assaults committed by him, and it was held that there was no error in such ruling. In Carroll v. State, 24 S. W. Rep. (Tex. Cr. App.) 100, it was decided that, for the purpose of impeaching a witness, he may be asked if he is not under indictment for theft. We might multiply citations to the same effect, but will conclude with the announcement that in the case before cited (People v. Casey, 72 N. Y. 393) it was declared that the extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court, and, as we do not perceive that the judge of the court below committed any impropriety in his election in this instance, we will forbear further consideration of the subject.

It will be sufficient to say in reference to the alleged errors of permitting Ike Nowell to detail an alleged conversation with Thomas B. Catron, one of counsel for the defendants, in reference to the testimony of said Nowell in this case, and in allowing Luiz Gonzales to do the same as to an interview between him and Charles A. Spiess, another attorney for the accused, that we recognize that counsel occupy such relations to their clients as to justify a disclosure of their action in the interest of such clients and for their benefit at their trial.

Many other errors are alleged which we do not deem it necessary to consider, and it may be remarked that in the multitude of assignments there appears

almost a lack of confidence in the substantial merits of the appeal, which impression is not diminished by the technical character of the complaints mainly relied on in the oral argument. Says the supreme court of the United States, in Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1071: "It is to be regretted that defendants found it necessary to multiply their assignments to such an extent, as there is always a possibility, in the very abundance of alleged errors, that a substantial one may be lost sight of." This is a comment which courts have frequent occasion to make, and one which is too frequently disregarded by the profession. Having reached the conclusion that none of the errors alleged by the accused to have been committed by the trial court were material, and being impressed that the instructions given are a fair, clear, and comprehensive enunciation of the principles by which the jury should have been guided in their consideration of the evidence, we do not discover any ground for reversal of the action of the lower court.

The evidence in the record is abundant to establish that the accused, in pursuance of a diabolical conspiracy of long standing, unlawfully, feloniously, willfully, and purposely shot Francisco Chavez with a deliberate intention to take his life; and the judges of the facts wisely found that there should not be, by their default, any escape for the perpetrators from the penalty for the unprovoked and cold-blooded assassination.

This case may, as to this territory, be pronounced a cause celebre from the prominence of the deceased, from the notoriety of the criminals, from the complication and mystery of the circumstances, from the delay in procuring a jury, from the time (nearly six weeks) and the money (amounting to thousands of dollars) consumed in the trial, from the extent and the intensity of the public interest, and from the excep-

tional skill and zeal displayed by counsel in its management; and it would be extraordinary if such litigagation, under such circumstances, did not develop difficulties formidable even to a court of large experience. We are much pleased to say that the presiding judge, though but recently elevated to the bench at the date of this trial, with admirable discrimination and commendable firmness held the scales of justice. In conclusion, we hereby affirm the judgment of the lower court in this case.

BANTZ, J., concurs.

COLLIER, J. (concurring).—In concurring in the result of affirmance in this case, I desire to submit some views upon the indictment, which has been so strenuously attacked by the counsel for plaintiffs in error, and with equal ability defended by counsel for the territory. The attacking counsel have supported their contention with common law authority, and it must be conceded that, if we are to adhere to what the chief justice shows were denominated the "unseemly niceties which are to the law a blemish and a reproach," the attempt on the part of the counsel for the territory in the trial court to employ equivalents of accustomed legal phrases would meet with disaster. This decision in no sense blazes the way of departure in this court from strict common law technicality, even if we did not think that the spirit of our statute had already pointed the road. As early as the case of Territory v. Maxwell, 2 N. M. 250, we find this court announcing, upon the principle of "cessante ratione cessat lex," that the courts of this territory should not follow the common law in prosecutions for embezzlement, as to do so would be to proclaim them powerless to punish in this day and age such an offense. The Missouri courts take a different view, and, while deprecating that they must, yet fear that in capital cases, at least,

innovations even as to form should not be allowed, as one would know not where they would stop. It is admitted by those courts that the popular acceptation of the word "instantly" makes it the equivalent of "then and there," but they reject the indictment because they know not to what point a departure will extend. State v. Reakey, 1 Mo. App. 3; State v. Lakey, 65 Mo. 217. With due respect for those courts, it appears to me they mention what might be taken as a most excellent limit to the "innovation," and they say they will not go to it. The rule I see no danger in is that stated by the court, to which this court looks for binding authority, where we find that in an indictment it is sufficient if time and place is stated "with reasonable certainty." Ball v. U. S., 140 U. S. 119, 11 Sup. Ct. 761. Can it be doubted that both the court of appeals and the supreme court of Missouri, if they considered that the popular acceptation of the word "instantly" was "then and there," would not have held indictments bad for its being used for "then and there," if they had recognized the rule of "reasonable certainty?" It is unnecessary to pursue this subject further as to the word "instantly," in view of its thorough discussion in the main opinion in this case, but I have thought there should not have been all omission in reference to the Missouri cases called to our attention, of which, however, it may be said that the latter ones seemed to proceed upon the theory that they must lie on the Procrustean bed which Judge NAPTON, in Lester v. State, 9 Mo. 666, set up in Missouri jurisprudence.

The indictment is also claimed to be bad and the verdict unintelligible, or at least not intelligible, for murder in the first degree, because murder in that degree is not exclusively charged. Again, we are remitted to the doctrine of equivalents. While a proper charge of murder in the first degree, as the pleader must have intended to charge this, would be that the

defendants did unlawfully, willfully, deliberately, and premeditatedly and with malice aforethought, kill, etc., he employs the words "unlawfully, feloniously, willfully, purposely, and with express malice aforethought, did," etc. Inasmuch as we ascertain that the statutory definition of express malice is a deliberate intention unlawfully to take away the life of a fellow creature, we may make another arrangement of words by equivalents; not equivalents, if objection may be made, that are so held by popular meaning, but equivalents as the statute says. Instead of the words in the indictment, we say, "did unlawfully, willfully, feloniously, purposely, and with the deliberate intention aforethought to take away the life of one Francisco Chavez, then and there a fellow creature," and thus we have every word in the statute except "premeditated," and in its place "aforethought." To ascertain whether "premeditated" is strictly necessary to define murder in the first degree, may perhaps be best done by seeing if the words we have could possibly define murder in the second degree, or a killing, which is statutorily called murder in the third degree. We will use our statutory substitution for the words of the indictment in an attempt to join with them words descriptive of murder in the second degree, to wit, "did unlawfully, feloniously, willfully, purposely, and with the deliberate intention aforethought then and there to take away the life of one Francisco Chavez, and without design to effect the death of said Francisco Chavez, while he, the said Francisco, was then and there engaged in the commission of a misdemeanor" (specifying the same), and so through with the different allegations which constitute murder in the second degree in its different phases. This collocation of words plainly expresses a contradiction creating an absurdity. Test these words by joining them with the words descriptive of murder in the third degree, and the contradiction in terms becomes

equally palpable. It is evident, however, and admitted on the argument by the able counsel for plaintiffs in error, that murder is charged in some degree, if the words "instantly died" may stand. I think it not an unfair method of ascertaining whether or not murder in the first degree is charged to show that it is impossible for these words to fit in the description of any other degree known to our law. Of course, it does not follow that because a lower degree is not described a higher degree must be, but it is legitimate to argue that equivalents in description, and especially if they are statutory equivalents, can by no stretch of construction apply elsewhere. As already said, we have, by substitution of the statutory definition for express malice, every word in this indictment that the statute calls for, except "premeditated." Instead of "deliberately and premeditatedly," we have "with the deliberate intention aforethought to take," etc. I think the indictment clearly sufficient after verdict, and that it charges murder in so exclusive a way, under our statute, as to make the verdict plainly intelligible. The record in this case I consider free from reversible error.

PER CURIAM.—The record in this case, as it was originally brought into this court, did not show that the defendants had been arraigned and had pleaded to the indictment. While the cause was here, an application was made to the district court where the defendants had been tried and convicted, in which it was averred that in truth and in fact the defendants had been arraigned and had pleaded not guilty before the trial below, and that the arraignment and pleas were omitted from the record by the inadvertence of the clerk. The district court was asked to order the correction of the record in these particulars by an entry nunc pro tunc. The application was presented in the presence of the defendants and their counsel, after due

notice; and, after considering it, and the proofs submitted on both sides, the district court granted the motion. The solicitor general then appeared in this court, suggested the diminution of the record here, and on his motion a certiorari was issued to the clerk of the court below, who thereupon sent up the record as amended, in which the arraignment and pleas of not guilty appeared as entered therein nunc pro tunc. A bill of exceptions was also prepared by the defendants covering the transactions which occurred on the proceedings to amend the record. The bill of exceptions was duly approved by the court, and has been brought here also on the certiorari by agreement of the parties. We have treated the matters of alleged error in this bill of exceptions assigned in the defendants' objection and protest as though it were a part of the principal case, and not as an independent proceeding. 1 Elliott, Gen. Prac., sec. 192. The district court, in the nunc pro tunc proceeding, acted with entire regularity, and its conclusion is abundantly supported by the proofs adduced, and no error is disclosed therein. The only question is as to whether the district court had any power to amend the record at all. This power is denied by counsel for defendants upon the following grounds: (1) That the amendments can be made in only those cases where there are some written memoranda on file in the cause on which the amendments may be based; (2) that, after the term has expired, inaccuracies in the record can not be corrected or omissions supplied by nunc pro tunc entries; (3) that they can not be made in criminal cases; (4) that they cannot be made by an inferior court while the cause is pending in a superior court on writ of error; and (5) that Judge Hamilton, who presided at the trial of the defendants, and made the nunc pro tunc order, was not clothed with judicial power to act in the premises.

AMENDMENT of record nunc pro tunc: proofs required.

1. The first of these grounds does not really relate to the jurisdiction or power of the court, but merely to the proofs which should be required, and in that aspect we considered this question in examining the bill of exceptions just mentioned, but we will express our opinion more fully upon this point at this place. The authorities are not harmonious as to the character of the proofs required to support nunc pro tunc entries. In Waldo v. Beckwith, 1 N. M. 103, and Secou v. Leroux, Id. 390, we held that the facts upon which the discretion of courts to amend records now as of then may be exercised should be "confined to their own records and to the officers in immediate connection with the courts." The rule of practice which has obtained in this territory since 1854 does not, therefore, require any written memoranda, if the facts warranting the amendment can be gathered from the officers in immediate connection with the court. Though the rule may be more restricted in some jurisdictions, we think Waldo v. Beckwith and Secou v. Leroux are supported by the weight of authority, and we see no reason for departing from it now, so far as it is applicable to this case. In a recent case the supreme court of the United States held that the circuit court could amend a record in a criminal case by an order nunc pro tunc, based upon a recollection of the facts by the judge. The court in that case, per Justice MILLER, say the first impression was that the power of the court over its own record to make such amendments after the expiration of the term was limited to those cases in which there remained some written memoranda in the case among the files of the court, by which the record could be amended if erroneous, or the proper entry could be supplied if omitted; "but," say the court, "we are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist." In re

Wight, 134 U. S. 137, 10 Sup. Ct. 489. In Kelly v. U. S., 27 Fed. Rep. 616, it was held that the record could be corrected on the recollection of the judge after the term had expired. In the case at bar the facts of arraignment and pleas of not guilty were shown by the affidavits of the clerk, the sheriff, and district attorney, and the stenographer of the court, whose notes and a verified transcript thereof were also produced. The order sets forth that upon such evidence, and upon the recollection of the judge of the fact of such arraignment and pleas of not guilty before the commencement of the trial, the record was corrected according to the facts. The order is supported by the oaths of officers in immediate connection with the court, the stenographic notes of a sworn officer, which belong to the files of the court, and the recollection of the facts by the presiding judge. Moreover, this conclusion is supported by the recital in the record that, "issue being joined," the trial was had, and a verdict of guilty was returned. This was sufficient alone, in our opinion, to justify the amendment since made, as the only issue which could have been joined upon which the verdict of not guilty would be responsive would be upon a plea of not guilty after arraignment.

2. There is diversity of opinion as to the source of the power to make nunc pro tunc entries, but there is none as to the existence of the power to make the records now as of then conform to and speak the actual truth of past transactions, where, by the neglect or inadvertence of the clerk, an omission has occurred, or a false entry has been made. Mr. ELLIOTT is of the opinion that the power did not arise from the statute of Henry VI., but is inherent. 1 Elliott, Gen. Prac., sec. 192. Other authorities, we think correctly, take the same ground. Balch v. Shaw, 7 Cush. 284; Fuller v. Stebbins, 49 Iowa, 376; Crim v. Kessing, 89 Cal. 478, 26 Pac. Rep.

CORRECTION of record after expiration of term.

1074; Works, Courts, p. 171. Our statute, however, allows nunc pro tunc entries to be made "whenever the ends of justice may require it." Comp. Laws 1884, sec. 1836. This statute is not confined to civil cases. The period in which this power could be successfully invoked is not limited to the term at which the transaction occurred. In one instance it was employed after the lapse of twenty-three years. Freem. Judgm., sec. 56. In a series of cases the supreme court of the United States has allowed such corrections years after the expiration of a term. The power thus possessed to at any time make the record speak the truth is, of course, not to be confounded with the correction of an erroneous or deficient order or judgment, truthfully entered, which must, of course, be made during the term. In the time of Edward I, Chief Justice HENGHAM and his fellow judges were heavily fined for so altering the records to speak falsely, and a tradition prevailed that a clock house was built at Westminster Hall from these fines. Lord COKE says that in the time of Elizabeth "Sir Robert Catlyn, chief justice of England, would have had Justice Southcote (one of his companions, justice of the king's bench) to have altered a record, which the justice denyed to doe, and said openly in court 'that he meant not to build a clock house.'" 1 Champ. Ch. Just. 112. BLACKSTONE says the severity of the proceedings against Hengham and his companions seems to have alarmed the succeeding judges that through fear of doing wrong they hesitated at doing that which was right, and, because Britton had forbidden alterations to make the records speak a falsity, "they conceived that they might not judicially and publicly amend it to make it agreeable to the truth;" so that "the legislature hath therefore been forced to interpose by no less than twelve statutes to remedy these opprobrious niceties. Its endeavors have been of late so well seconded by judges of a more

liberal cast that this unseemly degree of strictness is almost entirely eradicated, and will probably, in a few years, be no more remembered," etc. 3 Bl. Comm. 409. We think it quite clear that the power is not one evolved by modern cases, as counsel for defendants has insisted in his argument and brief. If the power was derived from the common law, then, even though it had not been authoritatively declared by judicial decision until recent times, it would be none the less operative in this territory. The decisions of the courts are merely evidence of what is common law. 1 Bl. Comm. 70, 71. Our statute, which makes the common law the rule of practice and decision, has not provided for a rigid body of laws found only in statutes enacted and decisions rendered prior to the Revolution, incapable of expansion, and inflexible, like a code. The law concerning corporations, libel, and indeed upon every subject, has been greatly modified or extended and improved since then by the gradual process of judicial decision, and it is one of the greatest virtues of the common law that it can be so molded to meet the needs of social development.

3. It is also urged that, whatever the power may be in civil cases, it does not extend to those criminal. This point was expressly ruled against in 134 U. S. 137, 10 Sup. Ct. 487. In Bilansky v. State, 3 Minn. 427 (Gil. 313), the court say: "The fact that the case is a capital one is in no way an absolute bar to its exercise, but it should be served to inspire the court with so anxious a solicitude to be right as to insure certainty. We can see no good reason why the court should not have made the amendments that it did in this case." In Benedict v. State, 44 Ohio St. 679, 11 N. E. Rep. 125, it was also held "this power may be exercised in criminal prosecutions as well as in civil cases." Elliott says, "Recitals omitted by mistake in criminal cases

AMENDMENT of record by order nunc pro tunc: extent of power.

may be supplied by entries now for then." 1 Elliott, Gen. Prac., sec. 192. The same rule was laid down in Ex parte Jones, 61 Ala. 399, and was fully recognized to apply to criminal cases in 1 Bish. Cr. Proc., sec. 1343; Kelly v. U. S., 27 Fed. Rep. 616; State v. Farrar, 104 N. C. 702; 10 S. E. Rep. 159; Freel v. State, 21 Ark. 226; State v. Primm, 61 Mo. 166.

4. It is also said that, as the cause was pending in the supreme court on writ of error, the district court could not amend the record. There is no reason why any distinction should be taken in this respect between appeals and writs of error. Perhaps it might be more regular to remit the record to the court below for correction, but it has been quite generally held that the removal of the cause by writ of error does not deprive the court below of the power to amend its record so as to make it conform to the truth. Freel v. State, 21 Ark. 226; Stebbins v. Anthony, 5 Colo. 342; Stephens v. Bradley, 2 S. Rep. (Fla.) 667; Pleyte v. Pleyte, 24 Pac. Rep. (Colo. Sup.) 579; Ross v. Steel Works, 34 Ill. App. 323; U. S. v. Vigil, 10 Wall. 424. And in Kelly v. U. S., 27 Fed. Rep. 616, it was allowed after the cause had been transferred from the circuit to the district court.

POWER of amendment after removal of cause by writ of error.

5. It is also objected that Justice Hamilton was not clothed with judicial power in the premises. Upon this point it is contended that under the organic law of the territory Justice Laughlin was the only judge having power to act in the First judicial district court, and that Judge Hamilton, although an associate justice of the supreme court, could not act, even though Judge Laughlin was disqualified by reason of his relation as counsel for the prosecution before his appointment to the bench; and the courts may thus become powerless to perform their duties. The whole

QUALIFICATION of associate justice to sit outside of his district: construction of statutes.

of the judicial power of the territory is vested in the supreme, district, and probate courts and justices of the peace. Act Sept. 9, 1850, sec. 10. The jurisdiction, original and appellate, shall be as limited by law. The supreme and district courts shall possess chancery and common law jurisdiction. Under the same act (1850) it was also provided that the territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law; and the said judges shall, after their appointments, respectively reside in the district which shall be assigned them. It will be noted that the judicial power which is thus vested in plenary terms in the district courts is to be exercised in each district "by one of the justices of the supreme court." It does not require that it shall be exercised by any particular one of the justices; and while, for the convenience of the public, a judge is to be assigned to each district, who is required to reside therein, there is no express or implied prohibition upon any judge against exercising power in any district not the one to which he has been assigned. There is nothing in the language of that clause requiring such a construction as will confine the exercise of the power to the particular justice assigned to the district, when that person is otherwise incapacitated. We have been cited to Stanley v. U. S., 1 Okl. 342, 33 Pac. Rep. 1025, as an authority holding a different opinion. We entirely agree with the court in that case that the district courts are creations of the federal congress and derive their powers and authority from the laws of the United States; but we also recognize that congress has said that the judicial power of the district courts is to be exercised "by one of the justices of the supreme court," and we cannot agree that the requirement that a justice shall be assigned to and reside in a district—a provision designed merely

for convenience—is sufficient, it may be, to paralyze the administration of justice, or, on the other hand, force a judge to preside who is unfitted by reason of his interest in the cause, or his previous employment as an attorney in the case. Moreover, the records of this court show that no assignment has ever been made of any judge to any particular district. In the year 1858 it became desirable to hold court at more than one place in each district, and congress granted authority for the holding of court in each county. There is nothing in this act (June 10, 1858) amounting to the prohibition contended for, and the maxim, "Expressio unius exclusio alterius," has no application whatever. It is idle to contend that such language is sufficient to block the wheels of criminal justice.

[No. 661. September 1, 1896.]

SCIPIO AGUILAR, PLAINTIFF IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT IN ERROR.

CRIMINAL LAW—MURDER—APPEAL—FAILURE OF CLERK TO SEND UP TRANSCRIPT.—On appeal, by the defendant in a murder case, which by section 2483, Compiled Laws, operates as a supersedeas, in such cases, it is the duty of the clerk, under section 2476, to send up the transcript without delay; and the failure or refusal of the appellant to pay for such transcript, can not be set up by the clerk as an excuse for his failure to do so.

ID.—INSTRUCTIONS.—It is the duty of the trial court to instruct the jury properly and fully as to the law in all criminal cases, as well as in civil cases, whether requested to do so or not, and its failure to do so is reversible error. Territory v. Friday, 8 N. M. 204.

ID.—MURDER—INSTRUCTION.—In a murder case, where the record utterly failed to show how or under what circumstances the killing occurred, the court erred in giving an instruction for murder in the first degree only. (LAUGHLIN, J., dissenting.)

ERROR, from a judgment of conviction for murder in the first degree, to the Fourth Judicial District

Court, San Miguel County. Rule directing the clerk of the fourth district to send up the transcript of the record and proceedings in this cause, made absolute. Reversed and remanded; LAUGHLIN, J., dissenting.

The facts are stated in the opinion of the court.

THOMAS B. CATRON and MIGUEL SALAZAR for plaintiff in error.

The court erred in not instructing the jury as to the different degrees of murder. Territory v. Nichols, 3 N. M. (Gil.) 103; Brannigan v. People, 24 Pac. Rep. 767; People v. Callaghan, 6 Id. 49; State v. Lindsay, 5 Id. 822.

The court erred in giving instruction number 1, which is a comment on the weight of the evidence, and argumentative in form. Thorp v. Geowey, 85 Ill. 612; Willis v. R'y, 4 Pac. Rep. 121; Brown v. State, 23 Tex. 195, 202; Zimmerman v. Knox, 8 Pac. Rep. 104; Leadbetter v. State, 21 Tex. App. 344; Payne v. State, Id. 184; 2 Thomp. on Trs., sec. 2287; Otterback v. Brown, 2 McArth. 541; Joues v. State, 65 Ga. 506.

The court erred in giving instruction number 4, which is contrary to law and misleading. 2 Thomp. on Trs., secs. 2511, 2512; Stark. Ev. [9 Am. Ed.], sec. 856; People v. Anthony, 56 Cal. 397, 400; Leonard v. Territory, 7 Pac. Rep. 872.

The court erred in giving instruction 6, which instructs that the jury are judges of everything, not the law. 2 Thomp. on Trs. 2424; Knowles v. People, 15 Mich. 408, 412; Brown v. R. R., 66 Mo. 588, 600.

The court erred in giving instruction 7, which told the jury they were the judges of the evidence, when, as a matter of law, juries are judges of the weight of the evidence. Stacey v. Cobbs, 36 Ill. 346; Battersby v. Abbott, 9 Cal. 565.

The court erred in giving instruction 8, which was misleading. Dawson v. State, 62 Miss. 241; Walker v. State, 42 Tex. 360, 369; U. S. v. Gooding, 12 Wheat. 460; Johnson v. State, 21 Tex. App. 368; Turner v. Comm., 86 Pa. St. 54. See, also, Ayer v. State, 21 Tex. App. 399; Walker v. State, 42 Tex. 360; Cunningham v. State, 56 Miss. 269; French v. State, 12 Ind. 670.

The court erred in giving instruction 9, which authorizes the jury to compare facts and circumstances without limiting them to the evidence. 2 Thomp. on Trs., sec. 2500; Cave v. State, 41 Tex. 182; Hunt v. State, 7 Tex. App. 212; Wallace v. State, 9 Id. 299; Turner v. State, 63 Tenn. (4 Lea.) 206; Comm. v. Webster, 5 Cush. 296; 1 Greenlf. Ev. 34.

JOHN P. VICTORY, solicitor general, for the territory.

Unless there is evidence to justify or require it, the court need not give instructions as to lesser degrees of murder. Sharf v. U. S., 156 U. S. 51, and citations; Territory v. Nichols, 3 N. M. 103; Territory v. Young, 2 Id. 93, 104; Territory v. Thomason, 4 N. M. (Gil.) 154; State v. Lane, 64 Mo. 319, 324; State v. Musick, 101 Id. 260; Robinson v. State, 84 Ga. 674; State v. Estep, 44 Kan. 372, 575; O'Brien v. Comm., 86 Ky. 354.

Instruction 1 is not argumentative, nor does it comment on the weight of the evidence. Section 2055, Compiled Laws, is a part of the civil procedure, and this court has doubted whether it applies in criminal cases. Territory v. Franklin, 2 N. M. 307; Territory v. Romine, Id. 114; Faulkner v. Territory, 6 N. M. 464; Trujillo v. Territory, 7 Id. 44.

Instruction 4 is not contrary to law or misleading. It simply means that each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. Scott

v. State, 19 Tex. App. 325; People v. Anthony, 56 Cal. 397.

Instruction 6 is not erroneous. The jury is the sole judge of the weight and credibility of the witnesses. Pierce v. State, 53 Ga. 365, 369; Skipper v. State, 59 Id. 64; Lane v. Bailey, 47 Barb. (N. Y.) 243; Brown v. R. R., 66 Mo. 588, 600.

A general exception to a charge is not sufficient to bring up for review any specific instruction. Leach v. Hill, 66 N. W. Rep. (Iowa) 69; Bush v. Nichols, 77 Iowa, 171; Austel v. James, 22 S. E. Rep. 953; Ripp v. Hale, 64 N. W. Rep. 454.

OPINION ON MOTION.

BANTZ, J.—On motion of the defendant in this court an order was made directing the clerk of the Fourth district to send up the transcript of the record and proceedings in this case, or show cause why the same should not be done. The clerk has made a return, and that portion which is material to the decision of this matter sets out in substance that the fees allowed for the preparation of the transcript have not been paid or tendered by the defendant. The defendant was convicted of murder in the first degree at the trial in the district court, from which the appeal was taken. Under the statute of the territory an appeal in such case operates as a supersedeas (sec. 2483, Comp. Laws).

MURDER: appeal: failure of clerk to send up transcript.

By section 2476 (Comp. Laws 1884), it is provided, "when an appeal shall be taken which operates as a stay of proceedings, it shall be the duty of the clerk of the district court to make out a transcript of the record in the cause and certify and return the same to the office of the clerk of the supreme court without delay." In section 2477 it is provided, "when an appeal does not operate as a stay of proceedings, such transcript shall be made out, ratified (certified) and returned on the

application of the appellant." In these two sections a clear destinction is taken between those causes in which there is a stay of execution, and those in which there is not; in the former the clerk of the district court is required to make out and return the transcript into the clerk's office of this court without delay, but in the latter it is to be made out and returned on the application of the appellant. If there has been a stay of execution, the territory becomes interested in a speedy determination of the appeal, and there is no way in which that appeal can be determined without a transcript before this court. If there has been no supersedeas, the judgment of the court below is carried into execution against the defendant notwithstanding the appeal. The same question, under like statutory provisions, was passed upon in State ex rel. v. Daily, Clerk, Etc., 45 Mo. 154, and Judge BLISS, speaking for the court, says: "In civil cases if the appellant fails to see that his transcript is filed, the respondent may produce one and take judgment; but in criminal cases, if it is not sent by the clerk upon supersedeas, according to the requirements of section 16, or not produced by the appellant when there is no supersedeas, according to section 17, I know not how the case will get here, or how the sentence is to be executed. If the clerk's duty is limited by the ability or willingness of the accused to pay him for the transcript, he need only to procure the allowance of the supersedeas, and then postpone indefinitely or defeat altogether the execution of the sentence. There is a marked distinction in appeals where there is a supersedeas and where there is none." "The duty then of sending up a proper transcript upon supersedeas in a criminal prosecution is imperative, and is not personal to the clerk, without the application of the accused. It becomes essential to the further prosecution of the case and the execution of the judgment in which the accused may have no interest." The

mandamus to the clerk was made peremptory. In Territory v. Hicks, 30 Pac. Rep. 872, this court pointed out the distinction to be observed in criminal cases on appeal between those with and those without supersedeas. Our conclusion therefore is that this being an appeal where the execution of the judgment of the court below is stayed, it is the duty of the clerk to make out and return the transcript into the clerk's office of this court without delay, and that the failure or refusal of the appellant to pay for such transcript can not be averred by an excuse for the failure so to do. Though it may have been the long standing practice for appellants in criminal cases to pay for such transcript, we are satisfied that the legislature has so provided as to excuse those who have obtained a stay of execution. As to what may be the right of the clerk in relation to costs in other respects is not necessary to decide.

The rule heretofore granted is made absolute.

SMITH, C. J., and LAUGHLIN and HAMILTON, JJ., concur.

OPINION ON THE MERITS.

HAMILTON, J.—Scipio Aguilar, the plaintiff in error, was indicted in the district court for the Fourth judicial district, in the county of San Miguel, on the twenty-ninth of September, 1894, for the murder of one Hilario Martinez and Juan Jimes. At the April term, 1895, he was tried in said court for the killing of Juan Jimes, and was discharged by the court. At the April term, 1896, he was tried under the other indictment for the killing of Hilario Martinez, and was found guilty of murder in the first degree. After unsuccessful motions for a new trial and in arrest of judgment, he brings the case here by appeal.

It appears from the record in the case that the defendant on or about the eighteenth of September,

1894, was traveling from a place called "Cochiti," in New Mexico, to his home, in San Miguel county; that while so traveling he came up with Hilario Martinez and Juan Jimes, who were freighters going in the same direction. He traveled with these parties during the remainder of the eighteenth, camped with them during the night, and traveled with them until late in the afternoon of the nineteenth, when they all stopped for dinner. After dinner they separated, the defendant going in the direction of his home, which he reached that night or the next day. Some four days after this the bodies of the two freighters were found dead in their wagons, some miles from the place where the defendant left them, and about four hundred yards from the road. He was never seen with them after leaving them on the evening of the nineteenth. They were never seen after that time until their dead bodies were found. The defendant was arrested, indicted, tried, and convicted, as above stated. It will be seen from this statement of facts that there was no eyewitness of the murder, and that there were no facts whatever developed upon the trial showing the circumstances under which the crime was committed. The killing was established, and the condition in which the bodies were found showed that death was produced by a dangerous weapon; but how, or under what circumstances, or what was done or said by the deceased or the slayer at the time of the homicide, does not appear. At the close of the evidence the court instructed the jury as to murder in the first degree only, and did not charge as to murder in the second or third degrees. In this failure of the court to instruct the jury as to murder in the second and third degrees, it is insisted by the plaintiff, there was error.

Under section 2054 of the Compiled Laws of New Mexico, it is made the duty of the court in all cases,

INSTRUCTIONS.

whether civil or criminal, to instruct the jury on the law of the case, and its failure or refusal so to do shall be sufficient ground for a reversal of the judgment. It has been held by this court that it is the duty of the district court properly and fully to instruct the jury as to the law in all criminal cases, whether requested so to do or not. Failure on the part of the court so to instruct is a ground of error. Territory v. Friday, 8 N. M. 204. Was it the duty of the district court, under the facts developed in this case, to charge the jury upon any other degree of murder than the first? "Murder" is defined by our statute to be the unlawful killing of a human being, with malice aforethought, either express or implied. Express malice is a deliberate intention unlawfully to take away human life. Malice is implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart. Under our statute, murder is divided into three degrees: First, all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, any felony, or perpetrated from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, is murder in the first degree; second, all murder which shall be perpetrated, without a design to effect death, by a person while engaged in the commission of a misdemeanor, or which shall be perpetrated in the heat of passion, without a design to effect death, but in a cruel or unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide, or which shall be perpetrated unnecessarily,

either while resisting an attempt by the person killed to commit any offense against the person or property, or after such attempt shall have failed, shall be deemed murder in the second degree; third, every killing of a human being by the act, procurement or culpable negligence of another, which is not murder in the first or second degree, is murder in the third degree. Every unlawful killing of a human being, with malice aforethought, is murder, either in the first or second degree. Under the facts in this case, it is only necessary to consider murder in the first and second degrees. The distinctive features which separate murder in the first from murder in the second degree are deliberation and premeditation, which are present in the first, and absent in the second. In both these degrees the killing must be unlawful, and in both it must be done with malice aforethought; but the two essential elements which constitute murder in the first degree, and which are not present in the second, are that premeditation and deliberation upon the acts done in the commission of a crime, which aggravate the offense, and remove all ideas of excuse or justification, and elevate the crime from one of murder in the second to one of murder in the first degree. If the murder is perpetrated by means of poison, lying in wait, torture, or in any attempt to commit a felony, or by an act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life, the law presumes that the acts by which the murder has been thus committed have been done with that premeditation and deliberation which constitute the crime murder in the first degree. Where a person has taken the life of another by either of these methods, the law has said that the very act of taking life in that form contains in itself the mental requirements of premeditation and deliberation, making it murder in the first degree without the proof of any other facts. In a trial for murder com-

mitted by one of these methods, the inquiry is as to whether the killing was committed by a method thus inhibited by the statute, and if it was so committed the court and jury may find from such killing that it was done with deliberation and premeditation. If, however, it is shown that the murder was committed in any other manner, then there is no presumption of law or fact, against the defendant, that the killing was done with deliberation and premeditation. "But a mere killing with such weapon, with nothing more, is not murder in the first degree. And where the statute requires a more distinct premeditation, or more intense malice, the verdict can only be for the second degree." 2 Bish. New Crim. Proc., sec. 602. While the death and the weapons or means used to produce death, may, in and of themselves, be sufficient to show murder, yet alone they raise no presumption as to the degree of the murder. If any presumption as to the degree is to be raised from these facts, it is the second degree; and, if the territory would lift the crime from this to the higher degree, it can do so only by the proof of such additional facts and circumstances in relation to the crime as will permit the court to charge, and the jury to determine, that it was done with that deliberation and premeditation which will make it murder in the first degree. If no such facts and circumstances are shown, it will be the duty of the court to so instruct, and the jury to find a verdict in the second, or, it may be, in a lower, degree. KERR, Hom., p. 99, in discussing this subject, says: "While the presumptions of malice are necessarily presumptions of murder, because all killing is murder, yet a presumption of malice, either from the act of killing, the weapon or means used, raises no presumption as to the degree of murder, and consequently no presumption that the homicide is more than the lowest degree of malicious killing, which is usually murder in the second degree. A higher

degree of guilt can be established only by additional proof of previous deliberation, premeditation, or reflection." While the rule thus laid down by Mr. Kerr is no doubt true in respect to the necessity of proof of deliberation and premeditation to raise the murder from the second to the first degree, and that malice is a necessary element of murder, we can not agree that malice is to be regarded simply as a presumption of law. It is an element to be found from the facts by the jury. Malice is not a presumption of law arising from the fact of the killing, though the killing may be sufficient to justify the jury in finding malice. Territory v. Lucero, decided at this term. Stokes v. People, 53 N. Y. 164; Milton v. State, 6 Neb. 136; People v. Belencia, 21 Cal. 544; State v. Turner, Wright, 26; Com. v. Drum, 58 Pa. St. 9; Dains v. State, 2 Humph. 439; Hamby v. State, 36 Tex. 523; Territory v. Romine, 2 N. M. 114. The burden of proof to establish the guilt of the defendant to the satisfaction of the jury, beyond a reasonable doubt, never shifts from the territory to the defendant, but remains with the territory throughout the trial; and, if the territory would convict the defendant of the highest grade of homicide, it can do so only by showing either that it was committed by that means from which the law presumes deliberation and premeditation, as if done by poisoning, lying in wait, etc., or by showing that the crime was committed under such circumstances that the jury, under a proper charge from the court, may find as a fact that it was done with deliberation and premeditation. Coffin v. U. S., 156 U. S. 432, 452–461, 15 Sup. Ct. 394; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353. In the case of State v. Payne, 10 Wash. 553, 39 Pac. Rep. 159, the court, in discussing the presumptions which arise from the proof of killing, say: "The premeditation required to constistute murder in the first degree is a distinct element,

having no relation whatever to the fact of the killing; and for that reason all the authorities hold that no presumption of murder in the first degree flows from the proof of the killing; but as to murder in the second degree the reasons which induced the holding at common law still have force." In the case of Stokes v. People, 53 N. Y. 164, after discussing this question of the different degrees of murder, the court use this language: "The intention may be inferred from the act, but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court. * * * Under the statute it is obvious that mere proof that one has been deprived of life by the act of another utterly fails to show the class of the homicide, under the statute."

MURDER: instruction.

The means by which the killing was effected in the case under consideration were not such as to bring the case within that class where deliberation and premeditation can be gathered. Thus, it was not done by poisoning, lying in wait, etc.; but, as charged in the indictment and shown in the evidence, it was committed under that clause of the statute which makes it necessary to prove deliberation and premeditation. It was therefore incumbent upon the territory to prove, not only the naked fact of killing, and that it was done with a dangerous weapon or instrument, but other facts and circumstances from which deliberation and premeditation could be inferred. If no proof was offered showing facts and circumstances from which such deliberation and premeditation could be inferred, it was the duty of the court to charge as to murder in the second degree. The facts, as disclosed by the record, show that the defendant, on the eighteenth of September, 1894, was traveling in his wagon, drawn by two horses, from a place called "Cochiti," in New Mexico, to his home, at Alamosita, in San Miguel county. He had

no load in his wagon, except his bed, wrapped up in a wagon sheet, a box with provisions, cooking utensils, harness, a rifle and such other things as he needed on his journey. Some time during the day of the eighteenth of September, he came up with the deceased and another boy, who were each driving a freight team, having four horses to each wagon. The wagons driven by the deceased were loaded with flour and other articles. The defendant and the two young men traveled along together during the remainder of the day of the eighteenth, and camped that night, and then traveled together until late in the afternoon of the following day, when they all went into camp near a place called "Ojito de las Conchas" for dinner. After they had gotten dinner and fed their horses, they hitched their teams and started out. The defendant bade the young men "good day," and drove ahead, in the direction of his home, where he arrived that night or the next day. He never saw the two young men after that, and was never seen with them. Some four days after this the dead bodies of the two boys were found several miles from the place where they and the defendant had taken dinner and separated on the evening of the nineteenth. The bodies were found one in each wagon, and were between three hundred and four hundred yards from the road. The heads and faces were badly cut and beaten up, showing that death had been caused by cuts or blows. They were in such condition at the time they were discovered that it was difficult to tell exactly the nature of the wounds by which death was produced. An ax belonging to one of them was found in one of the wagons with blood on it. Some of the sacks of flour were gone from one of the wagons. There is no direct evidence that the defendant ever saw the deceased after leaving them on the evening of the nineteenth. The two boys were not seen from that time until their dead

bodies were found, some four days afterwards. The record fails utterly to show how or under what circumstances the killing occurred. The record fails to show any threats, difficulty, or feeling of ill will between the deceased and the defendant, or any of the facts surrounding the commission of the homicide. Under this state of facts, was the court below correct in giving an instruction only of murder in the first degree? We think not. While, from the fact of the killing, and the nature of the instrument used to produce it, it might be found that the killing was unlawfully done, and that it was done with malice aforethought, yet have we the right, from these facts alone, unaccompanied by any other circumstances, to presume that it was done with that deliberation and premeditation which will make it murder in the first degree? If we can indulge in any presumption, we have more right to presume that the killing was done under such circumstances as would make it justifiable homicide, because nothing is presumed against the innocence of the accused. Might we not as well presume that the deceased brought on a difficulty resulting in his death? Or may we not also presume that the deceased attacked the slayer under such circumstances as would make the killing justifiable homicide? How are we to know, in the absence of any proof as to the circumstances of the killing, how it was perpetrated? In the absence of any proof upon the subject, must we assume that it was the highest degree of murder? We do not so understand the law. To presume the guilt of the defendant of murder in the first degree, in the absence of proof to establish it, is in conflict with that presumption of innocence which remains with the defendant until overcome by proof which establishes his guilt beyond a reasonable doubt. From the simple fact of the killing, without any proof as to any of the circumstances under which it was done, we have no more right to assume that it was

murder in the first degree than to assume that it was murder in the second degree or justifiable homicide.

Other grounds of error have been assigned by the appellant for reversal, among which is the action of the court in permitting testimony to be offered by the territory as to the contents of a certain letter supposed to have been written by the defendant. While we do not agree with the court below that a foundation was sufficiently laid to permit some of the witnesses to testify as to the contents of this letter, we deem it unnecessary to consider that question in the case. We think the court, under the state of facts presented in the record, should have given an instruction for murder in the second degree, and its failure to do so is error, for which the case must be reversed and remanded, and new trial granted, and it is so ordered.

COLLIER and BANTZ, JJ., concur. LAUGHLIN, J., dissents.

[No. 681. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JOSE PADILLA, APPELLANT.

CRIMINAL LAW—MURDER—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.—In a murder case, where there was no eyewitness to the killing, and death was shown to be the result of a gunshot wound, and there was no evidence to show that the murder was by poison or torture, and no circumstances showing necessarily that it was done by lying in wait, or that it was perpetrated in committing, or attempting to commit, a felony,—Held: That the failure of the court to instruct the jury in other than the first degree, was reversible error, as held by this court in Aguilar v. Territory, 8 N. M. 496.

ID.—MURDER—EVIDENCE—DEGREE OF MURDER—JURY QUESTION.—In such case, where the evidence was that deceased and defendant were neighbors in a small village, and partners in business; that they were on unfriendly terms; that deceased was seen to go up a prairie trail, followed by defendant carrying a gun; that soon afterward a shot was heard, and in a short time defendant was seen returning with a gun, walking as if he wished to escape observation; that

deceased was found dead from a gunshot; that a shell was found shown to be made for a gun not in general use, which kind of gun was found concealed in defendant's house,—Held: That under such circumstances the question as to the degree of murder was for the jury.

ID.—SANITY OF WITNESS—REQUEST FOR INSTRUCTION.—Where the testimony of a witness, whose sanity is attacked, is important, a special request for an instruction, as to his sanity or insanity, should be granted, though the testimony in the attack made be slight.

ID.—SANITY OF WITNESS—TESTIMONY OF NONEXPERT—COMPETENCY.—Where the sanity of a witness is attacked, a nonexpert witness may be asked as to the demeanor of the witness on a certain occasion or under certain circumstances, for the purpose of placing before the jury the facts from which the degree of mental capacity of the witness may be inferred, but not questions directly calling for an opinion as to his sanity or insanity, nor questions as to his general reputation in that regard.

APPEAL, from a judgment of the Fourth Judicial District Court, San Miguel County, convicting defendant of murder in the first degree. Reversed and remanded; BANTZ and HAMILTON, JJ., concurring in result, LAUGHLIN, J., dissenting.

L. C. FORT and O. A. LARRAZOLO for appellant.

The failure of the court to instruct the jury, as requested by defendant, as to the testimony of the witness, Ortega, who testified he did not understand what an oath was or its nature, was reversible error.

The admission of the shell in evidence was material error, for the reason that it was not shown to be the same shell that was found. It devolved upon the prosecution to prove every material fact or circumstance tending to show defendant's connection with the crime charged. 1 Greenlf. Ev. [13 Ed.], sec. 74; Whar. Crim. Ev. [8 Ed.], secs. 319, 320. See, also, 1 Greenlf. Ev. [13 Ed.], sec. 82; 1 Black, Com. Book 3, 371; Burr on Cir. Ev. 730; Porter v. State, 1 Tex. App. 396; Williams v. East India Co., 3 East, 192; 1 Phil. Ev. [4 Am. Ed.] 635; Comm. v. Carter, 11 Pick. 277; U. S. v. Reyburn, 6 Pet. 366; Wilson v.

State, 12 Tex. App. 487; 1 Greenlf. Ev. [13 Ed.], sec. 99; Whar. Crim. Ev., secs. 220, 221; 9 Am. and Eng. Ency. Law, 325, and citations.

The court erred in admitting, over defendant's objections, the testimony of Wooster as to the experiments made by him with the gun, in the absence and without the knowledge of defendant. 1 Stark. Ev. 52; 2 Bouv. Law Dic. "Res inter alios acta," p. 467; 3 Stark. Ev. 1300; Byrd v. State, 26 Tex. App. 385; Bookeser v. State, Id. 595; Chew v. State, 23 Id. 237; Haines v. State, Id. 568; Chunely v. State, 20 Id. 557; Thomas v. State, 18 Id. 223.

The court also erred in admitting the testimony of the witness as to the mental operations of the witness Ortega. Whar. Crim. Ev. 456; Zantzinger v. Weightman, 2 Cranch, C. C. 478; Whitman v. Freeze, 23 Me. 185; Shepard v. Willis, 19 Ohio, 142; Gilman v. Riopelle, 18 Mich. 145; State v. Garvey, 11 Minn. 154; Hudgins v. State, 2 Ga. 173; Hawkins v. State, 25 Id. 207; Clement v. Cureton, 36 Ala. 120. See, also, Whar. Crim. Ev., secs. 458, 460, 417, and citations.

It is the duty of the court to instruct the jury as to all the law upon each and every issue raised in the particular case. Comp. Laws 1884, sec. 1054; Laws N. M. 1891, ch. 80; 1 Whar. Crim. Prac., sec. 709; State v. McDonnell, 22 Vt. 491; People v. Rego, 43 Hun. 127; Longnecker v. State, 22 Ind. 247; State v. Braintree, 25 Iowa, 572; State v. Mesheke, 51 Id. 308; People v. Dunn, 1 Idaho, 75; Strady v. State, 5 Cold. 300; Soney v. State, 13 Lea. 472; State v. Hendricks, 32 Kan. 559; Hirsch v. State, 25 Ga. 399; Woodbury v. State, 69 Ala. 12; State v. Mitchell, 64 Mo. 191.

The presumption of the innocence of the accused until proven guilty, beyond a reasonable doubt, is a legal right to which he is entitled absolutely, and not

by reason of any gracious humanity of the law, as charged by the court. Whar. Crim. Ev. [8 Ed.], pp. 1, 718.

JOHN P. VICTORY, solicitor general, for the territory.

The sheriff and justice Wooster were just as competent to find out if the rifle of defendant had been fired within a recent period as any expert. It was offered as a part of the res gestae. People v. Manks, 78 N. Y. 611; Myers v. State, 14 Tex. App. 35; State v. Jones, 41 Kan. 309; 2 Bish. Crim. Proc., sec. 631, subdiv. 7.

In murder cases, others than experts may give their opiuions as to the sanity or insanity of a defendaut, provided such opinions are accompanied with statements of the facts upon which they are based. In this case is an attempt to prove the insanity of a witness, and not of the defendant. Choras v. State, 31 Ga. 424; 1 Thomp. on Trs., sec. 379. It is for the jury, and not for witnesses, to draw inferences from facts. Morehouse v. Mathews, 2 N. Y. 574; Bank v. Isham, 48 Vt. 590; Tomlin v. Hilyard, 43 Ill. 300.

Section 2055, Compiled Laws 1884, embraces a part of our civil procedure, and has no application to criminal cases. Territory v. Franklin, 2 N. M. 307; Territory v. Romine, Id. 114; Faulkner v. Territory, 6 N. M. 464; Trujillo v. Territory, 7 Id. 44.

COLLIER, J.—The appellant, Jose Padilla, was convicted of murder in the first degree in the district court of the county of San Miguel. Motions for new trial and in arrest of judgment being overruled, appellant was sentenced to death; and from this judgment this case is here on appeal, a bill of exceptions being duly allowed.

The evidence to connect the appellant with the killing of one Juan Garcia y Martinez is purely cir-

cumstantial. There was no eyewitness to the killing itself, and death was shown to be the result of a gunshot wound inflicted upon the left side of the body of deceased. There being no evidence whatever to show that this was murder by poison or torture, and there being no circumstances showing necessarily that it was done by lying in wait, or that it was perpetrated in committing, or attempting to commit a felony, the case is controlled by that of Territory v. Aguilar, in which the opinion is this day rendered by this court; and it must, therefore, be reversed and remanded for a new trial, because of the failure of the court to instruct the jury in other than the first degree. Territory v. Friday, 8 N. M. 204, and other cases there cited.

MURDER: circumstantial evidence: instruction.

In this case it was shown that the deceased and defendant were neighbors in a small village; were partners in the ownership of a mill, which had lain idle several months because of disagreements in business; were unfriendly and scarcely spoke when the met. Their houses were three or four hundred yards apart. A trail led over the hills to the prairie, which was in full view of both houses. Early in the afternoon of the day of his death, deceased went up that trail to the prairie to look for his horses, and about sundown was found dead on the prairie, about eight or nine hundred yards from his house, with a bullet hole in his left side. A witness, by name Ortega, saw the deceased when he went up the trail. Not long afterward he saw defendant go up the same trail, carrying a gun. He heard a shot, and in a short time defendant came down the trail, still having his gun, and walking in a way as if he wished to escape observation. There was other testimony showing that an empty cartridge shell was found the next morning, with dirt on it, as if it had lain out and been spattered

MURDER: evidence: degree of murder: jury question.

by the rain the night before. This shell was shown to be made for a gun not in very general use, called a "Henry rifle," and defendant had this kind of gun at his house. When it was asked for by the sheriff, two days after the homicide, his wife took it from between mattresses in the inner room. The place where the body was found was in full view of persons on the prairie, but hidden from the little village, which was under the hills. This was, in effect, the entire case of the prosecution, to which the defendant set up and sought to prove an alibi by persons testifying that he remained at the house the entire afternoon of the day. He sought also to prove that the kind of shell found near the body was of a kind kept in stock in Las Vegas, and that it fitted and was used in another class of gun than the Henry rifle. As a reason for keeping the gun between the mattresses, it was testified that there was a small child around the house, and it was safer to keep the gun in that place. Also the credibility of the witness Ortega was sought to be attacked by evidence showing that he was mentally unsound. It should be said that it was also shown by the prosecution—or, rather, circumstances were put in evidence which the prosecution claimed showed—that the defendant's gun had at the time of the inquest been recently discharged.

By the instruction of murder in the first degree alone, the court must have assumed, which the defendant denied, that there was hostility existing between him and the deceased, that when he left, following on the trail deceased had just taken, he did it from a premeditated design to take the life of deceased; and that, at all events, when the killing actually took place it was not in the heat of passion, or in other ways, so as to make the offense of a lower degree, or even justifiable or excusable homicide. It was for the jury to say whether there was a motive existing in defendant's

mind which would make him seek the life of deceased. It was also for the jury to say whether the defendant, in following the trail deceased had taken shortly before, was pursuing deceased with the intention of killing him, or if his doing so was merely a coincidence. If they had disbelieved the testimony as to motive, they might also have reached the conclusion that defendant was not pursuing deceased for the purpose of killing him. It was for the jury to judge of the credibility of the witnesses as to these matters, and then, having done that, to say what weight should be given to the circumstance that defendant had, with a gun in his hand, gone up the same trail which the deceased had taken. Surely, if the jury had discarded the evidence as to motive, it would have been no great step for them to have reached the conclusion that the prosecution had not established beyond a reasonable doubt the ingredients which make a case of murder in the first degree.

We go further, however, and say that, admitting the motive to have been proven, that defendant saw the deceased go up the trail, and followed after him with a gun, with a deliberate and premeditated design unlawfully and maliciously to effect his death,—yet, with no eyewitness of the homicide, it is not necessarily shown that it was so accomplished. It is not the intent of the mind that the law regards as criminal, but it is the overt act flowing from that intent. There is no question but that a verdict of murder in the first degree would be supported by the evidence that defendant was hostile to deceased, that he followed after him with a gun, that a shot was heard, and the deceased was killed from the effect of a bullet in his body, as there would be circumstances tending to show deliberation and premeditation; but, before arriving at such a verdict, it was necessary for the jury to believe beyond a reasonable doubt that no

sudden quarrel arose, and that deceased was killed in the heat of passion, without design to effect death, or that defendant did not kill deceased in any other of the ways constituting murder in the second degree, and that it was not done by the culpable negligence of defendant, and that it was not done under such circumstances as constitute excusable or justifiable homicide, as defined by the first paragraph of section 692 and section 693, Compiled Laws, New Mexico, 1884.

We have said this much as to this homicide, not as desiring again to go over this matter, so exhaustively discussed, as the writer believes, in the opinion of Justice HAMILTON in Territory v. Aguilar, supra, but only because this case differs from that, in that the kind of weapon used there, and the way death was effected, precluded the idea of death by culpable negligence, or by accident or misfortune, as described in section 693, supra. The cardinal distinction between all homicides not shown by eyewitnesses, and homicides where the killing is shown by eyewitnesses, is that as to the former class the jury must weigh the circumstances, and determine what degree of murder is proven, while as to the latter the court may instruct the jury as to a single degree, or two degrees, or all the degrees, as, or not, the evidence may be applicable to one or more degrees. If the secret killing were shown to be by poison or torture, or necessarily in the commission of, or attempt to commit, a felony, or by lying in wait, then, also, even in cases of circumstantial evidence, the court may restrict instructions to first degree. If the rule were that every secret homicide presumes murder in the first degree, then the slayer of a man whose body is found pierced by bullets, having in its hand a weapon recently discharged, is placed in the same category as he who has slain unseen a defenseless woman, whose polluted corpse bears evidence of the

utmost atrocity. Such a rule is not reconcilable with reason, of which law should be the perfection; and the only escape from it is for the jury, and not the judge, to weigh all the circumstances which may satisfy their minds as to how the secret killing may have been effected, and determine the degree of the slayer's guilt.

As this case goes back for new trial, we consider it well to notice one or two of the other assignments pressed upon us.

It is complained that the trial judge failed to give a requested instruction as to circumstantial evidence. There was an instruction as to this in the charge of the court, but in our opinion the plaintiff in error was entitled to have had more distinctly stated to the jury, than was done in the court's own instruction, the request made, which is as follows: "In a case of circumstantial evidence, the evidence against the accused must be such as to exclude, beyond a reasonable doubt, every hypothesis or theory other than that he is guilty as charged; and if their remains in the case, all the evidence considered, any reasonable theory, arising out of the evidence, which raises in the mind of the jury a reasonable uncertainty of defendant's guilt, such a state of evidence would justify an acquittal." We think the court's instruction did not fully advise the jury as to the exclusion of every reasonable theory other than that of guilt, and that its general statement—while sufficient in the absence of a special request—while not, in our opinion, reversible error, was not all the plaintiff in error was entitled to.

SANITY of witness: request for instruction.

Another assignment we will notice relates to the failure of the court to instruct, upon special request made, as to the sanity or insanity of the witness Ortega, so that the jury could consider the attack made upon him, in weighing his credibility and the weight to be given his testimony. The testimony of this witness

was exceedingly important, and, though the testimony in the attack made appears to have been slight, yet if there was any the court should have instructed in that regard, if specially requested. Thorwegan v. King, 111 U. S. 549, 4 Sup. Ct. 529; Pennock v. Dialogue, 2 Pet. 1. The decision of this court in holding that, where the general charge substantially covers what is requested, there is no error in refusing to give what is requested, must by inference be considered as recognizing this rule. Territory v. Trujillo, 7 N. M. 43; U. S. v. De Amador, 6 N. M. 178; Territory v. O'Donnell, 4 N. M. 210. The court admitted in evidence questions tending to show that witness talked irrationally at times, that he "fussed" with women without cause or provocation, and that he acted in a way that caused a witness to think he did not have good sense. It rejected the answer of Judge Wooster when he was asked as to the demeanor of Ortega at the coroner's inquest, as compared to what it was before the jury in the trial in the court below. Judge Wooster answered that the demeanor was similar, as near as he could remember; that he was considered by him there as being a very stupid witness, and uncertain as to facts he stated. The court also rejected direct questions calling for an opinion as to Ortega's sanity or insanity, and what was his reputation as to sanity or insanity. Upon the subject of impairment of the mind, it is stated in Pease v. Burrows, 29 Atl. Rep. (Me.) 1061, that "the adjudged cases on this subject are few, but the doctrine of them seems to be that the condition of the mind, if the witness is capable of appreciating the truth, must go to the credibility of the witness, and be submitted to the jury." In Reg. v. Hill, 5 Cox, Cr. Cas. 259, Lord CAMPBELL, in delivering judgment, said: "It is for the

SANITY of witness: testimony of nonexpert: competency.

judge to say whether the insane person has the sense of religion, and whether he understands the nature and sanction of an oath, and the jury are to decide the credibility and weight of his evidence." This enunciation was expressly approved in District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840. When it is remembered in this connection that the witness Ortega stated that he did not know the nature of an oath, it would appear that this instruction asked, and which was upon a subject not directly referred to in the court's charge, should have been given. There is a most interesting discussion upon the subject of what testimony may be given by witnesses, who are not experts, in the way, if not of opinion, at least closely allied to opinion, found in Com. v. Sturtivant, 117 Mass. 133, in which the opinion was delivered by ENDICOTT, J., and concurred in, among others, by GRAY, C. J., and DEVENS, J. It does not appear from that opinion that a witness not an expert may directly say whether, in his opinion another is sane or insane, but he can testify to conclusions, as to which the details enabling him to arrive at the conclusions can not be presented to the jury. After citing very numerous examples in decisions from various states, the learned judge summarized the matter as follows: "The competency of this kind of evidence rests upon two necessary conditions: First, that the subject-matter to which the testimony relates can not be reproduced, as described to the jury, precisely as it appeared to the witness at the time; and, second, that the facts upon which the witness is called to express an opinion are such as men in general are capable of comprehending and understanding." As to this, a very apt example appears in the case of McKee v. Nelson, 4 Cow. 355, which was a breach of promise case, and the trial court admitted the following question: "Is it your opinion that the plaintiff was sincerely attached to the defend-

ant?" The court say: "We think the judge's decision founded on good sense, and, in the nature of things, we do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded are capable of specification, so as to leave it, like ordinary facts, as a matter of inference to the jury. It is true that, as a general rule, witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we believe this to be one. There are a thousand nameless things, indicating the existence of the tender passion, which language can not specify. The opinion of a witness on this subject must be derived from a series of incidents passing under his observation, which yet he could not detail to a jury." In Com. v. Wilson, 1 Gray, 337, the court, speaking by Chief Justice SHAW, says "that a witness not an expert can testify as to the appearance and conversation of a person with whom he had interviews, but not what opinion he formed at those interviews of his mental condition." In Barker v. Comins, 110 Mass. 487, in which the question was as to the sanity of a testator, Justice GRAY, delivering the opinion, said that a witness could not answer whether testator was of sound or unsound mind, but could testify whether there was apparent change in the man's intelligence or understanding, or want of coherence in his remarks, as this was not a matter of opinion, but of fact, as to which any witness who has had an opportunity to observe may testify, in order to put before the jury the acts and conduct from which the degree of mental capacity may be inferred. Under the rule we have stated, as laid down in Com. v. Sturtivant, supra, and with which the decisions we have cited seem to be in accord, and which we think the true rule, we hold that such testimony as Wooster gave was competent, that witnesses could be asked as to conduct and appearance, and that this testimony should have been admitted

along with what was admitted, but not the questions directly calling for an opinion as to the sanity or insanity of said Ortega, and, of course, not what was his general reputation as to sanity.

It is complained also that the court did not fully advise the jury, by definitions of terms used by the statute, as to what was meant by the degree of murder, to which their attention was confined. As, in the retrial of this case, it will (if defense is made as in the record before us) be necessary to instruct as to all the degrees, and as to justifiable and excusable homicide as well, this error can not be expected to recur. Wherefore it is considered that this cause be reversed, and remanded for a new trial.

LAUGHLIN, J., dissents.

BANTZ and HAMILTON, JJ. (concurring).—We fully concur in the opinion of Justice COLLIER in this case, except as to that portion which holds that a nonexpert may not state his opinion or conclusion as to the sanity or insanity of a person whose mental soundness or capacity is under consideration. When a nonexpert is shown to be qualified, by reason of opportunity for knowing and observing the person under investigation, he may not only state what he has observed in the conversation or conduct of such person tending to indicate his mental condition, but the nonexpert may also state his conclusion or opinion as to the ultimate fact, founded as it is or may be upon a series of facts more or less symptomatic, and not susceptible of intelligent narration. When a witness testifies that a person appeared to be angry or sick, he states a conclusion or opinion based upon a number of symptomatic facts which could not be adequately detailed so as to photograph to the jury the same impression which they made upon the mind of the observer when they were seen, and the statement of the conclusion can alone

describe the facts seen. The case in Massachusetts gives many illustrations of this rule, and it is now well established that the same rule is applicable to a nonexpert, as in the case at bar. Upon this subject Mr. GREENLEAF says: "But where the witness has had opportunity for knowing and observing the conversation, conduct, and manner of persons whose sanity is in question, it has been held, upon grave consideration, that the witness may depose, not only to particular facts, but to the opinion or belief as to the sanity of the party, formed from such actual observation;" "that nonexperts, who have had opportunities to observe a person, may give their opinion of his sanity, at the same time stating their reasons, and the facts observed upon which they based their opinion." 1 Greenl. Ev. [4 Ed.] 532; Whart. Cr. Ev. [9 Ed.], secs. 417, 458, 460.

[No. 666. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLANT, v. ELLEN L. LOCKHART, APPELLEE.

CRIMINAL LAW—PERJURY—INDICTMENT—PLEADING.—An indictment for perjury need not aver matters in detail, showing how the question in relation to which the testimony was given became material, but the pleader may, at his election, charge it was thus material, or set out facts from which its materiality will appear in law, and where the false testimony is delivered on the trial, the former is the common and better method. Overruling Territory v. Remuzon, 3 N. M. (Gil.) 648.

ID.—PERJURY—INDICTMENT—GENERAL AVERMENT—SUFFICIENCY.—A general averment, in an indictment for perjury, that the several alleged false statements, as set out in the indictment, are false, without specifically negativing any fact testified to by the witness, is fatal on demurrer.

APPEAL, from the Second Judicial District Court, Bernalillo County, sustaining a demurrer to an indictment against defendant for perjury. Affirmed.

The facts are stated in the opinion of the court.

JOHN P. VICTORY, solicitor general, for the territory.

While an averment of the materiality of false testimony is necessary in an indictment for perjury, yet the pleader may, at his election, say that it was material, or set forth such facts as to show its materiality in law. 2 Bish. Crim. Proc., sec. 921; State v. Sharpe, 85 Am. Dec. 498; 2 Whar. Crim. Law, 153; Kelly's Crim. Law and Prac. 557; Wood v. People, 59 N. Y. 117; Walson v. State, 5 Tex. App. 11; State v. McCormick, 52 Ind. 169; Stofen v. State, 3 W. Va. 689; State v. Davis, 69 N. C. 495; U. S. v. McHenry, 6 Blatch. 503; State v. Chandler, 42 Vt. 446; People v. Tex., 28 Mich. 492; Rich v. U. S., 1 Okla. 354; State v. Thompson, 113 N. C. 638; State v. Madijan, 51 Minn. 425; People v. Brilliant, 58 Cal. 214; Kimmel v. People, 92 Ill. 457; State v. Nees, 47 Ark. 553; Comm. v. McCarthy, 152 Mass. 577.

WARREN, FERGUSSON & GILLETT for appellee.

A simple allegation of the materiality of the alleged false testimony is not sufficient; but the materiality must be shown by setting out such testimony. Territory v. Remuzon, 3 N. M. (Gil.) 648.

The indictment is fatally defective, in failing to negative, by specific averment, the alleged false testimony. 3 Whar. Crim. Law, sec. 2259; Arch. Crim. Pl. 428–430; 2 Bish. Crim. Proc., secs. 922, 923; Martinez v. State, 7 Tex. App. 394; 18 Am. and Eng. Ency. Law, 316; State v. Morse, 2 S. W. Rep. 792; Comm. v. Weingartner, 27 Id. 852.

BANTZ, J.—The defendant was indicted in Bernalillo county for perjury committed while testifying in a

civil cause in the district court. To that indictment a demurrer was interposed, her demurrer was sustained and the territory has appealed.

The indictment in the first count sets out a number of things testified to by the defendant touching conversations she had with Leeds, Johnson, and Wills, but in the assignment of the perjury the indictment did not negative in terms the facts so testified to, but avers that in truth and in fact that Leeds, Johnson, and Wills "did not make any such statements or offers to her," and "did not make any such statements as to said Pilkey having been in collusion with the said Frank Fagaly and the said Lee Walker for the purpose of defrauding the said Henry Lockhart and Benjamine Johnson of their interest in said claim." The second count charges that she testified that Johnson, Leeds, and Wills told her that Pilkey, Walker, Fagaly, and Neelan were going into a scheme to do Mr. Lockhart up; that they, Johnson, Leeds, and Wills, got money from Neelan and had gone into a conspiracy to defraud Henry Lockhart by abandoning of the mining claim for the purpose of enabling Fagaly, Walker, and others to take possession of the same as against said Henry Lockhart and Benj. Johnson, and that they got money from Neelan to aid the prosecution of said conspiracy and scheme. And the assignment of perjury was that the said Leeds, Johnson, and Wills did not make "any such statement" to the defendant.

The demurrer sets up two grounds, namely: (1) that said indictment does not set forth facts sufficient to show that the alleged testimony of the defendant given upon said trial was upon any material question involved therein; and (2) that the assignment of perjury upon the alleged testimony of defendant upon said trial as averred in said indictment, and in each count thereof, are insufficient in law, for that the same are general, and do not specifically negative any par-

ticular fact alleged to have been falsely testified to by this defendant upon said trial.

PERJURY: indictment: pleading.

1. In Territory v. Remuzon, 3 N. M. 648, it was held that: "It is not sufficient to charge generally that a certain question was or became material, but the indictment must set forth facts showing how it becomes material. The omission of these essential averments in this indictment is fatal." This rule is not in harmony with the rule generally recognized by text writers and sustained by the decisions. In Bishop's recent work on Criminal Procedure it is laid down that: "The averment of the materiality of false testimony in an indictment for perjury being an essential element in the offense must be averred, and the pleader in doing this may at his election say that it was material, or set out facts from which its materiality in law will appear. He need not do both. When the false testimony is delivered in a trial the former is the common method, and better practically. Even a few of the cases seem to require it to the exclusion of the latter." 2 Bish. New Crim. Proc., sec. 921; 2 Whart. Crim. Law, 153; State v. Thompson, 113 N. C. 638; State v. Madigan, 51 Minn. 425; Com. v. McCarthy, 152 Mass. 577. The indictment in this case fully sets forth the question averred to be material in relation to which the testimony was given, and we think this was sufficient, without averring matters in detail showing how the question became material. So far Territory v. Remuzon, 3 N. M. 648, is overruled.

PERJURY: indictment: general averment: sufficiency.

2. Nowhere in any assignment of perjury in either count is there any specific negative of any fact testified to. Speaking of this part of an indictment for perjury, Mr. BISHOP observes: "This is the gist of the offense, not mere inducement, consequently the allegations must be direct and specific, not in terms of uncertain meaning, or by way of implication. Simply

to say for example that the defendant falsely swore is not adequate." And furthermore: "It must particularize wherein the testimony was false, a general allegation that it was so not being sufficient." 2 Bish. N. C. Proc., secs. 918, 919. In Rex v. Perrott, 2 Maule & Selw. 386, Lord ELLENBOROUGH said: "Suppose the offense had branched out into twenty or thirty matters of which some might be true, and used only as the vehicle of the falsity, are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified and not to the whole." "The charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction parts of which only are meant to be impeached for falsehood." In Gibson v. State, 44 Ala. 23, the court say: "It is necessary that the indictment should expressly contradict the matter falsely sworn to by the defendants; and a general averment that the defendant falsely swore upon the whole matter of the oath is not sufficient. The indictment must proceed by particular averment to negative that which is false." This subject received a full consideration in Gabrielsky v. State, 13 Tex. App. 437, and speaking of an indictment in that case, which covered a number of facts sworn to upon which the assignment of perjury was general, the court say: "It is simply a general averment that the several alleged false statements, as set out in the indictment, are each and all false without negativing them in detail, and without stating the truth in regard to each. At common law all the authorities hold this to be insufficient and we have been unable to find a single

precedent, either at common law or in our own state where the assignment of perjury has been dispensed with." "He (the defendant) should be told in the indictment wherein and to what extent the statements alleged to have been made by him were false, that he may know certainly what he is called upon to answer." See, also, Burns v. People, 59 Barb. 532; 1 Arch. Crim. Plead., secs. 297–538; State v. Mace, 76 Me. 64.

The indictment in this case does not specifically negative any fact testified to by the witness, and therefore the demurrer was properly sustained and the judgment will be affirmed.

SMITH, C. J., and LAUGHLIN and HAMILTON, JJ., concur.

[No. 671. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JOSE CHAVEZ y CHAVEZ, APPELLANT.

CRIMINAL LAW—WITNESSES—ACCOMPLICES—PARDON—CREDIBILITY—IMPEACHMENT.—Where accomplices, previously convicted of crimes, who had been restored to competency as witnesses by pardon, appeared for the prosecution, the court erred in refusing to permit them to state, on cross-examination, the nature of and facts in connection with such crimes of which they had been convicted, in order to impeach their credibility; and in ruling as to one of such witnesses that, if it should appear that the witness had been useful in discovering the crime, it would be no reason for the court to depart from "fundamental principles of law, as it appreciates them," as implying in the opinion of the judge it was truthful testimony.

ID.—ACCOMPLICES—PARDON—INDUCEMENTS TO TESTIFY.—The court also erred in excluding evidence as to the liberty and favor granted such witnesses by the prosecution notwithstanding their conviction for such crimes, and in confining the inquiries to whether the inducements had been offered by persons having authority. The jury should have been instructed that they must consider the inducements under which such testimony was offered.

APPEAL, from a judgment of conviction for murder, from the Fourth Judicial District Court, San Miguel county. Reversed and remanded.

The facts are stated in the opinion of the court.

VEEDER & VEEDER for appellant.

While a pardon will restore to a convicted felon the right to testify in any case, it will not restore his moral character, and give a new credit to his statements under oath, and the fact of such conviction, the crime for which he has been convicted, and the time he has served in the penitentiary may be brought out on cross-examination for the purpose of impeaching his credibility. Comp. Laws 1884, sec. 2086; Whar. Crim. Ev., secs. 363, 489, note 10; Real v. People, 42 N. Y. 270.

All the questions put by counsel for defendant to the witnesses, Caballero, Trujillo and Baca, on cross-examination, as bearing upon their credibility, and excluded by the court, were competent and should have been answered. 1 Thomp. on Trials, secs. 459, 460; 1 Greenlf. Ev. [14 Ed.], sec. 455; Whar. Crim. Ev., sec. 444; Wilbur v. Flood, 16 Mich. 40; Pitcher v. People, Id. 142; State v. Kent, 62 N. W. Rep. 631; People v. Hare, 24 Id. 843; Foster v. People, 18 Mich. 265; State v. Miller, 13 S. W. Rep. 832; Real v. People, supra; 29 Am. and Eng. Ency. Law, 674; State v. Martin, 28 S. W. Rep. 12.

"The test of whether a fact inquired of on cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case." When applying this test it must clearly appear that this whole line of cross-examination of defendant was collateral and immaterial. Whar. Crim. Ev., sec. 484; 1 Thomp. on Trials, sec. 470; 1 Greenlf. Ev. [14 Ed.], sec. 449; Rapal. Crim. Proc., sec. 311; Stokes v.

People, 53 N. Y. 164; People v. Webb, 11 Pa. 509; 29 Am. & Eng. Ency. Law, 793; Railroad Co. v. Reese, 56 Fed. Rep. 288; Carter v. State, 54 N. W. Rep. 852; Randolph v. Comm.. 11 S. W. Rep. 813; People v. Hillhouse, 45 N. W. Rep. 484.

JOHN P. VICTORY, solicitor general, for the territory.

The court did not err in limiting the cross-examination of witnesses for the territory by the defendant, and in not permitting defendant to question such witnesses upon collateral and independent facts for the purpose of affecting their credibility. Marks v. Hilsendeger, 46 Mich. 336; Bissell v. Starr, 32 Id. 299; 1 Thomp. on Trials, sec. 461.

Nor will such cross-examination be allowed for the purpose of impeaching them by contradiction. Clinton v. State, 33 Ohio St. 27; People v. Devine, 44 Cal. 452; Hester v. Comm., 85 Pa. St. 139; 1 Thomp. on Trials, sec. 469.

The extent to which such cross-examination should go, in all cases, rests in the sound discretion of the trial court, and the decision of the court, in the exercise of such discretion, is not subject to review. Storm v. U. S., 94 U. S. 76; State v. Rollins, 77 Me. 380; 1 Thomp. on Trials, sec. 464. See, also, Graham v. Davis, 4 Ohio St. 362; Blake v. Powell, 26 Kan. 320; Walker v. Walker, 14 Ga. 242; 1 Thomp. on Trials, 343.

The court properly refused the instructions offered by defendant upon the other points raised by appellant. Thomp. on Trials, sec. 2352; State v. Miller, 67 Mo. 604; Laber v. Cooper, 7 Wall. 565; R. R. v. Horst, 93 U. S. 291.

BANTZ, J.—The defendant was convicted in San Miguel county for the murder of Gabriel Sandoval and sentenced to death, and the cause is brought here on appeal.

It is claimed for the accused that the only witnesses whose testimony directly connected the defendant with the crime charged are accomplices in the crime. The credit to be given to their testimony was therefore of the highest importance. To shake that credit it was sought, on cross-examination of each of such accomplices, to show that he had a past history for criminal actions, which, if exposed, would have had a material influence upon the weight to be given his testimony by the jury. It is claimed that the right to so cross-examine was denied, and that the court committed error in so doing.

The attack upon the credit of a witness must ordinarily be confined to proof of general reputation, and specific acts may not be shown, unless relating to the interest, bias or prejudice of the witness. But according to the more modern American cases the attack may also be made on cross-examination, in which the witness may be required to disclose matters in his own history, provided they clearly affect his credibility, even though they may tend to disgrace him. See, also, opinion of Lord ELDON in Parkhurst v. Louten, 2 Swan. p. 216. The latitude of such cross-examination is to enable the jury to understand the character of the witness they are called upon to believe. It is to be presumed that the witness will protect himself as far at least as the truth will permit, and no one can know better the favorable circumstances. The answers thus given upon such collateral matters can not of course be contradicted. Upon these general propositions see LeBean v. People, 34 N. Y. 223; Stokes v. People, 53 N. Y. 164; Beebe v. Knapp, 16 Mich. 54, and note; U. S. v. Wood, 33 Pac. Rep. 59; State v. Miller, 13 S. W. Rep. (Mo.) 832; 1 Greenl. Ev. 455; Whart. Crim. Ev., sec. 476. The extent to which cross-examination will be permitted is in no doubt in a large measure in the discretion of the trial court; and

it is difficult to draw the line as to where the legal discretion as to the admission or the exclusion of such testimony commences, and where it ends. The truth is the thing to be sought. Assaults upon a witness by cross-examination into collateral matters can not be allowed to gratify the caprice or the displeasure of those against whom he testifies; and intrusions into private affairs which are calculated merely to wound the feelings, humiliate or embarrass the witness, will not be permitted. Ephland v. Mo. Pac. R. Co., 57 Mo. 147; 1 Greenl. Ev., secs. 455–461. As was said by Mr. WHARTON, "if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness box would become itself a scandal which no civilized community would tolerate." Whart. Crim. Ev., sec. 472. But a clear distinction is to be taken between those matters called for on cross-examination which merely excite prejudice against the witness or tend to humiliate him or wound his feelings, and those matters on the other hand which are calculated in an important and material respect to influence the credit to be given to his testimony. As to the latter class the witness can not be shielded from disclosing his own character on cross-examination, and for this purpose he may be interrogated upon specific acts and transactions of his past life, and if they are not too remote in time and clearly relate to the credit of the witness in an important and material respect it would be error to exclude them. Greenl. Ev., 455–461; Whart. Crim. Ev., sec. 476; Steph. Dig. Ev. How far justice may require such examinations to go, how much time should be spent upon them, what should be excluded for remoteness of time, and what for being trivial or unimportant, must depend in some measure upon the circumstances of each case. Watson v. Trombly, 60 N. H. 491; and these are questions addressed primarily to the discretion of the trial court, but the

discretion should be liberally exercised. Real v. People, 42 N. Y. 282.

The latitude in cross-examinations is particularly necessary where spies, informers, and accomplices are used as witnesses, otherwise the life of the person on trial must often be wrongfully endangered. Phil. & Am. Ev., 917; 2 Phil. Ev., 422. Whether the facts showing the infamous or disgraceful record of the witness be drawn from a stranger who comes forward unexpectedly to deliver material testimony, or is drawn from one, though known to the parties, may be unknown to the jury or some of them, there is no other way of discovering his credibility to the jury, unless perchance his character should be so utterly bad and publicly known as to furnish means of attack as to general reputation. Wilbur v. Flood, 16 Mich. 43.

With these general statements we will now examine the record upon this subject. Guadalupe Cabellero and Julian Trujillo were, if their testimony is to be believed, accomplices and co-conspirators with the defendant in the assassination of Gabriel Sandoval and were called as witnesses against him, together with one Manuel Gonzales y Baca, who testified as to defendant's admissions in regard to his flight from Las Vegas after the discovery of the body of the murdered man. It was shown, upon examination of these men upon the voir dire, that they had been convicted of crime and sent to the penitentiary. Their pardons were then produced by the prosecution. These pardons operated to restore them to competency as witnesses, but did not restore their credit. It (the pardon) removes the disability, but does not change the common law principle, that the conviction of an infamous offense is evidence of bad character for truth. The general character of a person bad enough to destroy his competency as a witness, must be bad enough to affect his credibility, when

WITNESSES: accomplices: pardon: credibility: impeachment.

his competency is restored by the executive," etc. Curtis v. Cochran, 50 N. H. 244. It further appears that the witness Cabellero had been convicted of larceny and sent to the penitentiary, that he was indicted for the murder of one Patricio Maes, and also for the murder of Gabriel Sandoval and pleaded guilty of murder in the second degree in both cases, but when the defendant inquired on cross-examination what the witness had been sent to the penitentiary for, the court sustained an objection, and would not permit investigation further than the mere record; upon the same ground permission to cross-examine him as to whether he had actually participated in the murder of Maes was denied. We do not think the proofs should have been confined so absolutely to the record of those crimes; while a detailed examination would be calculated to confuse the issue and produce prolixity, which must be, of course, avoided (Toledo, etc., R'y v. Bailey, 43 Ill. App. 292), yet a murder committed under circumstances of atrocity and extreme deliberation would show a far deeper moral depravity than one committed in the heat of passion, and we think the court drew the line too narrowly, especially as it appears from the questions asked the witness Manuel Gonzales y Baca, that it was intended to show that the murder of Maes was committed pursuant to a secret meeting at which his death was determined upon by his confederates in crime. It was also sought to show that notwithstanding these convictions against Cabellero he was allowed to continue at liberty upon his own recognizance. In ruling out such cross-examination the court repeatedly held that the inquiries should be confined to whether the inducement to testify had been made under promise or hope of reward from "any person competent to make such tender to him." The witness for the territory, Julian Trujillo, had also been convicted of the murder of

ACCOMPLICES: pardon: inducements to testify.

Sandoval and sent to the penitentiary, from which he had been pardoned. The pardon itself recites that Trujillo had rendered valuable assistance in discovering many other crimes, and that he was needed as a witness for the purpose of bringing to conviction the guilty parties. The witness Manuel Gonzales y Baca had been indicted for robbing a store and postoffice, also for cow stealing, and also for the murder of Patricio Maes; while in jail he had sent for the district attorney, whom he informed that Sandoval's body was buried in a privy vault, and the same night after this conference he was released from jail. He was asked whether he had not testified against the others who participated in the robbery of the postoffice, but the court sustained an objection to the question. The defénse also sought to show that the witness was connected with the gang of outlaws by whom Maes was murdered, and whether he had not presided at the meeting at which Maes was condemned to death, but objections to these questions were sustained. It was also sought to show that he had never been put upon trial for any of these offenses, but had been allowed his liberty on his own recognizance. Objections to these questions were also sustained.

While sustaining these objections the court ruled that specific acts could not be shown either upon cross-examination, or by other witnesses, and that the inquiry was limited to general reputation, and also observed: "If it should appear that this witness has been useful in discovering the infamy that has disgraced the civilization of this community, it would not be any reason for this court to depart from adherence to fundamental principles of law as it appreciates them." Exception was reversed to the remark as well as the ruling of the court. It will not be amiss to observe that while we entirely agree with the learned judge that the testimony in this case disclosed appalling infamy, and

while it is probably true that the prosecution was compelled to employ the testimony of infamous men in order to bring those equally if not more infamous to justice, yet the jury should have been left to weigh and sift the testimony of these criminals, unembarrassed by any suggestion or intimation of opinion by the court, so that every reasonable facility should be afforded the jury to give such testimony all the credit it deserved, but no more credit than it really deserved. The case was being tried before the jury who were to pass upon the guilt of the defendant, his life was involved, and it was his right to have the testimony weighed without regard to its usefulness in the discovery of the infamy to the officers of justice. The remark of the judge, suggesting the usefulness of such testimony in bringing the guilty to justice, implied, in the opinion of the judge, it was truthful testimony, although disclosing the infamy of the witness and his confederates, who had disgraced the civilization of the community. Such a remark was a harmful comment on the credit or weight to be given to the testimony.

Applying the principles of law which we considered in this opinion (before adverting to the rulings of the court in the exclusion of the testimony of these witnesses upon cross-examination), we think that the court committed serious error in so sustaining these objections we have mentioned; we think it quite clear that the matters sought affected in an important degree the credit of the witnesses, and it was entirely competent to attack their credibility in this way upon cross-examination, and attack by proofs of general reputation was not the only way open. See Territory v. DeGutman, 8 N. M. 92, in addition to authorities already cited.

The court also committed error in excluding evidence as to the liberty and favor accorded these wit-

nesses by the territory, notwithstanding their conviction for crimes, and in confining the inquiries as to whether the inducements had been offered by persons having authority. In State v. Kent, the accomplice who had testified against the defendant was asked on cross-examination whether he expected to be hung for his admitted crime, and also whether he had in fact been prosecuted or imprisoned; the court below had sustained objection to the question and it was held reversible error. Say the court: "Even if no express promise of immunity is made, the accomplice may be led to believe something in the conduct or speech or tone of voice of some one connected with the prosecution that nevertheless his testimony involving another in guilt with him will earn him some consideration at the hands of those who control his fate." The testimony offered "bore directly on the question whether he was not testifying under hope. Without any express promise, he might infer from the fact that no proceedings had been taken against him, but that the whole strength of the prosecution was directed against Kent (the defendant) alone, that he was to be the recipient of some favor." 62 N. W. Rep. 638. The same rule has been laid down by the supreme court of Michigan in People v. Hare, 24 N. W. Rep. 843. These remarks seem especially pertinent in this case, where the whole burden seems to have been directed against this defendant, although others equally deserving of punishment are given pardons and liberty. In the days when Titus Oates and Bedloe and Dick Talbot flourished, the successes of informers and conscience stricken accomplices caused innocent men to tremble. It is not less necessary in New Mexico to-day that men like Cabellero, Trujillo and Gonzales y Baca, should stand in the witness box in their true characters, stripped of all disguises, so that the jury may know and judge of their testimony for as much but no more than it is

worth. And the jury should be instructed, as they were not in this case although such an instruction was requested, that they should consider the inducements and influences of hopes or promises under which such testimony is given. For these errors the judgment is reversed and the cause remanded for a new trial.

COLLIER, HAMILTON, and LAUGHLIN, JJ., concur.

[No. 685. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JOHN CHAMBERLAIN, APPELLANT.

CRIMINAL LAW—HOMICIDE—SUDDEN AFFRAY—EVIDENCE—INSTRUCTION.—On a prosecution for murder, where the evidence was that defendant fired the fatal shot in a sudden affray between a party to which he belonged and that of deceased, in which the former were the aggressors, and several shots were exchanged,—Held: That a charge of murder in the second degree was supported by the evidence.

ID.—REMARKS OF PROSECUTING ATTORNEY TO JURY.—On such trial, a remark of the prosecuting attorney to the jury: "Gentlemen, you are all Americans; the defendant is an American; the victim a poor Mexican sheep herder. But I do not believe that, because the victim was a Mexican, you will fail to do your duty,"—Held: That this language was not sufficient to justify a reversal.

APPEAL, from a judgment of conviction for murder in the second degree, from the Fifth Judicial District Court, Lincoln County. Affirmed.

The facts are stated in the opinion of the court.

A. A. FREEMAN for appellant.

JOHN P. VICTORY, solicitor general, for the territory.

Where there is even slight evidence that the offense committed may have been of a lower degree than the one charged, it is proper for the court to give to the

jury the law of such offense. State v. Patterson, 34 Pac. Rep. (Kan.) 784; Territory v. Young, 2 N. M. (Gil.) 93.

Where the instruction of murder in the second degree is given to the jury, and the proof was sufficient to convict of murder in the first degree, the instruction, though erroneous, being more favorable to the defendant than the evidence would warrant, he can not complain. Territory v. Salazar, 3 N. M. (Gil.) 321; State v. Alston, 113 N. E. Rep. 666; S. C., 18 S. E. Rep. 692; Marshal v. State, 14 S. Rep. 92; State v. Berkley, 19 S. W. Rep. (Mo.) 192; Jones v. Comm., 25 Id. (Ky.) 877.

An instruction relative to murder in the second degree is not objectionable on the ground that it excludes a verdict of acquittal, where an instruction on reasonable doubt was also given. Housh v. State, 61 N. W. Rep. (Neb.) 699; S. C., 43 Neb. 373.

BANTZ, J.—The evidence tended to show that the defendant and two other American cattlemen rode into a camp of some Mexican sheep herders, ordering the latter to take their sheep away from the range, which they proceeded to do. The deceased and his brother Bonifacio went with the burros to a lake near by to get some kegs filled with water when the defendant and his two companions rode up. The firing soon after began. Bonifacio testified that one of the Americans struck him over the back with a rope; and that two of the Americans fired their rifles without hitting either the deceased or Bonifacio, that deceased was standing with his rifle on his arm, and "by the time he went to move his gun he had been struck and he fell back, and as he was on his back he fired up in the air;" deceased was facing the defendant and his two companions when they fired their rifles, they afterwards fired at the deceased and the witness with pistols, though witness was not struck. A shot was fired which struck the gun

of deceased which caused him to fall down, and while down he attempted to get up when the defendant fired the shot which killed the deceased. The shooting occurred near the railroad running between Magdalena and Socorro and was seen by an engineer on a passing train who testified at the trial. He testified that he was about seventy-five or a hundred yards away, about three miles the other side of Water Canon. I noticed several cowmen and several Mexicans with burros, and it seemed like there was a little trouble."

"Q. What did they (the cowboys) seem to be doing? A. Appeared like they were driving those other parties away, apparently.

"Q. Driving the Mexicans away? A. Yes, seemed that way.

"Q. Go on; state what you saw. A. Appears to me one of the cowmen was lashing his rope or lariat, apparently hitting one of the Mexicans over the back or head, and soon one of the Mexicans bent over apparently for some reason or other; in the meantime one of the white men jerked out his six shooter and fired, or a gun; then I saw the Mexican fall over. I saw smoke from the gun; then the shooting commenced from all directions; the Mexican commenced shooting; he was lying on the ground; the rest of them were shooting from all directions, riding away. That's about all I saw of it; the train went rapidly by." On cross-examination he testified in regard to the first firing.

"Q. At that time did one or two guns fire first? A. Just one at the beginning.

"Q. Then the man shot at fell over? A. He fell down; yes, sir.

"Q. Then he commenced firing and the others commenced firing? A. I would not be certain whether the man that got shot did the firing or whether it was his partner; they were both together."

There were some eight, ten, or a dozen shots fired. Saml. Tingley, another witness, testified that he was working on the range at the time and the evening of the day of the killing the defendant and Crow and Franklin came to him and "they" told him that they had some difficulty with some Mexican sheep herders—that "they were going along and one of the sheep herders kept edging away from the sheep herd, and directly one of them had a difficulty with another sheep herder, and there was some trouble and John Chamberlain told me—I think it was him said that when he was watching this sheep herder and this George Franklin—and as he was watching them this Mexican kept edging away and heard him throw a cartridge into his gun and he looked around and saw this Mexican have a gun leveled on him and he threw down on him and both fired at the same time."

The defendant was convicted of murder in the second degree and sentenced to imprisonment in the penitentiary for sixteen years. Two errors have been assigned, the first of which is that the court erred in instructing as to murder in the second degree, when under the evidence it was the duty of the jury to acquit unless they found the defendant guilty of murder in the first degree. The second error claimed is that the district attorney made improper and prejudicial remarks in his closing address to the jury.

1. The circumstances disclosed in the evidence were sufficient to justify the jury in finding that the killing was the result of a sudden affray arising in hot blood. The whole transaction must have occupied but a very few moments as shown by the testimony of the engineer of the passing train. The charge as to murder in the second degree was not therefore without support in the evidence "any theory legitimately aris-

HOMICIDE: sudden affray: evidence: instruction.

ing out of the evidence imposes upon the court the duty of submission by appropriately instructing upon the law governing it, and this without regard to the strength or weakness of the supporting facts. Uniform with the previous rulings of this court, is the doctrine here declared, viz.: The charge of the court must make a pertinent application of the law covering every theory arising out of the evidence; that the duty is not dependent upon the court's judgment of the strength or weakness of the testimony supporting the theory, it being the prerogative of the jury to pass upon the probative force of the testimony." Liskosski v. State, 3 S. W. Rep. 698; Territory v. Friday, 8 N. M. 204. "The jury have the right to determine whether or not the state of the prisoner's mind was such as to rob him of the premeditated purpose or design to kill." Territory v. Baker, 4 N. M. (Gil.) 236.

2. In his closing address to the jury the district attorney said: "Gentlemen; you are all Americans; the defendant is an American; the victim a poor Mexican sheep herder, but I do not believe that because the victim was a Mexican that you will fail to do your duty." To this language the defendant's counsel excepted, and it is urged that the remark was improper and prejudicial. There is nothing in the language of the district attorney at all calculated to induce the jury to deal unfairly with the defendant in the consideration of his guilt or innocence under the evidence. Had there been any suggestion in these remarks tending to influence the jury to find a verdict against this defendant on account of his birth or nationality, whether Mexican or American, any such suggestion or attempt would deserve and receive the severest reprimand, and we would unhesitatingly reverse the judgment in such a cause. But such is not the case here. There is no

REMARKS of prosecuting attorney to jury.

error in the record, and the judgment will therefore be affirmed.

SMITH, C. J., and LAUGHLIN and COLLIER, JJ., concur.

[No. 635. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. SOSTENES LUCERO AND JUAN B. ROMERO, APPELLANTS.

CRIMINAL LAW—MURDER—INSTRUCTIONS.—On a murder trial, an instruction that if one of the defendants shot and killed deceased while the other stood by without objecting or protesting, both were guilty of murder in the first degree, which did not even require the jury to find that the nonobjecting defendant knew or suspected the co-defendant's design to kill deceased, nor that he was in a situation to prevent such killing, was prejudicial error, although the verdict was for a conviction of murder in the second degree, the only instruction as to murder in the second degree consisting of a description of that offense following the terms of the statute, and the instructions for murder in the first degree being numerous and failing to correctly state the law.

ID.—INSTRUCTION—JURY QUESTION.—An instruction that if defendants made false statements as to the killing, it should be construed as tending to establish their guilt was an invasion of the province of the jury.

ID.—STATEMENTS OF OFFICERS IN RELATION TO OFFICIAL ACTS—INSTRUCTION.—An instruction that false statements by officers in relation to their official acts should be construed as an aggravation of their offenses, and if knowingly and willfully made, would justify the jury in disregarding the whole of their testimony, was erroneous. It is not only essential that the falsity should be willful, but it must also be in relation to a material fact. The law demands no higher standard for weighing the statements of fact by public officers than other citizens.

ID.—MURDER—MALICE—PRESUMPTION—ONUS—INSTRUCTION.—On a trial on indictment for murder, an instruction to the jury that malice is implied from the fact of killing and that it devolved upon defendants to establish the contrary, was error, especially where the killing was admitted, and the evidence for defendant tended to show that it was done under considerable provocation, after deceased had attempted to escape by slaying his guards.

APPEAL, from a judgment of conviction for murder, from the Fourth Judicial District Court, Mora County. Reversed and remanded.

The facts are stated in the opinion of the court.

W. B. CHILDERS, H. L. WARREN, and B. M. READ for appellants.

"In a criminal case, the establishment of a prima facie case only does not take away the presumption of defendant's innocence, nor shift the burden of proof. Agletree v. State, 28 Ala. 693; People v. Milgate, 6 Cal. 543; 1 Bouv. Law Dic. 227; 1 Benn. & Heard, Lead. Crim. Cases, 352; 9 Metc. (Mass.) 93; 5 Cush. 296; 2 Gratt. (Va.) 594; 1 Wright (Ohio), 20; 5 Yerg. (Tenn.) 34; 16 Miss. 401. See, also. State v. Lopez, 15 Nev. 414; People v. Woody, 45 Cal. 289; 6 Green's Criminal Rep. 420; People v. Arnold, 15 Cal. 476; State v. Porter, 34 Iowa, 139; 1 Green's Criminal Rep. 241; Tweedy v. State, 5 Iowa, 533; Dixon v. State, 13 Fla. 636; Dukes v. State, 14 Id. 499; Stathes v. People, 53 N. Y. 176, as applicable to fourteenth instruction, given at request of territory.

JOHN P. VICTORY, solicitor general, and THOMAS B. CATRON for territory.

The definition of reasonable doubt, given in instructions 32 and 33, were proper and accurate, and are approved by the best precedents. Kerr on Homicide, secs. 519–521, and citations.

As to instruction 14, while there is a species of presumption that the acts of public officials are regular, it can hardly be contended that this presumption extends to such a case as that at bar, where the act was killing, which was no part of the officers duty under the warrant committed to him for execution and return. State v. Rollins, 18 S. E. Rep. (N. C.) 394.

It was incumbent on the officers, as upon every other person similarly situated, the killing having been established, to prove justification, if it existed, and the burden of establishing justification or excuse, and of rebutting the presumption of malice arising from the act of killing, was on defendant. State v. Rollins, supra.

SUPPLEMENTAL BRIEF FOR TERRITORY.

On reasonable doubt, citing: State v. McCahill, 33 N. W. Rep. (Iowa) 599; Spies v. People, 12 N. E. Rep. (Ill.) 865; McMean v. Comm., 9 Atl. Rep. (Pa.) 878; Hopt v. People, 120 U. S. 430; State v. Elsham, 31 N. W. Rep. (Iowa) 66; Dunbar v. U. S., 156 U. S. 185.

On burden of proof, citing: State v. Jones, 3 S. E. Rep. (N. C.) 506; U. S. v. Crow Dog, 14 N. W. Rep. (Dak.) 437; State v. Welch, 6 S. E. Rep. (S. C.) 894; State v. Byers, 6 S. E. Rep. (N. C.) 420; People v. McCarthy, 18 N. E. Rep. (N. Y.) 128; State v. Whitson, 16 S. E. Rep. (N. C.) 332; Wilkins v. State, 13 S. Rep. (Ala.) 312; Comm. v. York, 50 Mass. 93; 1 Greenlf. Ev., sec. 14, and notes; Comm. v. Hawkins, 3 Gray, 465; Comm. v. Webster, 5 Cush. 295; Vann v. State, 9 S. E. Rep. (Ga.) 945; 2 Stark. Ev. 948, and note 1; Silvas v. State, 22 Ohio St. 90; Weaver v. State, 24 Id. 584; Davis v. State, 25 Id. 369; Lewis v. State, 15 S. E. Rep. (Ga.) 697; Territory v. Manton, 19 Pac. Rep. (Mont.) 387; State v. McIntosh, 18 S. E. Rep. (S. C.) 1033; Cleveland v. State, 5 S. Rep. (Ala.) 426; Gibson v. State, 8 S. Rep. 98; Roden v. State, 12 Id. 419; Mugler v. Kas., 123 U. S. 623; People v. Callaghan, 6 Pac. Rep. (Utah) 49; State v. Turner, Wright (Ohio), 20; Hill's case, 2 Gratt. 594; State v. Hobbs, 17 S. E. Rep. 580; Vance v. Comm., 19 Id. (Va.) 785; Meyers v. Comm., Id. 881; State v. Payne, 10 Wash. 345; State v. Gassert, 66 Mo. 352;

State v. Evans, 65 Mo. 574; Robertson v. Comm., 20 S. E. Rep. (Va.) 362, and as to presumption of malice see Act 1891, p. 151, sec. 3, and similar statutes discussed in People v. Clough, 32 N. E. Rep. (Mich.) 905.

"Where defendant is convicted of murder in the second degree under a fair charge, he can not complain of an instruction given relative to murder in the first degree." State v. Alfray, 27 S. W. Rep. 1097.

BANTZ, J.—The appellants were indicted at the March term, 1894; of Mora county, for the murder of Juan Antonio Rael, they were tried at the following November term, and found guilty of murder in the second degree, and sentenced to imprisonment for life in the penitentiary. Numerous errors are assigned, but we need notice only those in relation to certain instructions given to the jury, at the request of counsel for the prosecution.

It was claimed by the territory, that the defendants after arresting the deceased under a warrant for murder, pretended that he tried to escape, and so killed him; when in truth the arrest was a mere pretense, and under color of it, the real design of the defendants was to murder the deceased, and that such design was in fact carried out as the result of a deliberately planned conspiracy. The defendants testified in their own behalf, that they in good faith acted as deputies sheriff, and arrested Rael on a warrant for murder, and that Rael, who was known by them to be a dangerous man, after his arrest suddenly drew a pistol from a coat tied to the saddle, and shot at defendant Romero, when he was shot and killed by the defendant Lucero. Under the instructions of the court the proof of conspiracy was not made essential to conviction, and the jury were told they might acquit one defendant and find the other guilty. The presiding judge fairly and correctly instructed the jury as to murder in the first degree, and he defined murder in the second degree in the terms of

the statute; but counsel for the prosecution presented numerous instructions which were given to the jury which did not fairly or correctly state law, and we think were seriously harmful to the defendants.

1. The ninth, tenth, eighteenth, nineteenth, twenty-second and thirty-first of these instructions, given at the request of the prosecution, told the jury in substance that if one of the defendants shot and killed Rael, while the other stood by without objecting or protesting, both were guilty of murder in the first degree. Ordinarily an error in an instruction as to murder in the first degree will not be ground for disturbing a verdict of murder in the second degree; but it may very well happen that instructions as to murder in the second degree, though without error, may be extremely meager, and at the same time there may be a mass of instructions as to murder in the first degree, so involving the guilt of one defendant in that of the other as to cause him great prejudice. In this case the only instruction specified as to murder in the second degree consisted of a description of that offense following the terms of the statute. It seems to us that when the jury are told, as in the case at bar, that the law regards him who stands by without objecting or protesting when a killing is done, as guilty of murder in the first degree, equally with him who fires the shot, then with equal reason it would seem that if the guilt of the one who fired the shot was murder in the second degree, so also would his companion be guilty of murder in the second degree if he stood by without protesting or objecting when the shot was fired. If that result followed in the higher crime why not also the lower one? There is nothing in any instruction which would tend to prevent a conclusion so evident on the part of the jury. The natural tendency of the instruction was to induce the jury to conclude that if Romero stood by without pro-

MURDER: Instructions.

testing or objecting when Lucero shot Rael, the guilt of Romero became established. The effect of such an instruction is not at all like a misdirection as to the qualities, conditions or elements essential to murder in the first degree, and which do not tend to influence a verdict of guilty in some other degree. The injury which such instructions would naturally cause a defendant is made more apparent by the fact that the confounding of the guilt of Romero in that of Lucero, was not only emphasized by repeated reiteration in the particular we have just mentioned, but also in other particulars hereafter to be mentioned. It can hardly be pretended that the instructions correctly state the law; they did not even require the jury to find that the nonobjecting defendant knew, or even suspected, the codefendants design to kill Rael, nor that he was in a situation to prevent such killing. In certain other instructions, viz.: eighth, ninth, and twenty-second, the jury were told that an arrest made by two persons rendered both guilty of murder, if one of them after the arrest killed the person arrested. The ninth and twenty-second instructions use, it is true, the words "acting together," but these words refer to making the arrest, and not to the killing. If the acting together was really intended to extend to the killing as well as the arrest, then in a case of such gravity the meaning is too loosely expressed, and, moreover, it was not sufficiently full to express the essentials of a common unlawful design. To render two persons responsible for a killing done by one, it is not sufficient to tell the jury that if the defendants acted together and one of them killed, both are equally guilty. Such a direction would be too vague and misleading. But whatever doubt may be entertained as to the meaning of the phrase acting together, the eighth instruction told the jury that both were guilty whether acting pursuant to or without any previous agreement, if after the arrest

one of them killed Rael. "A mere looker-on while a crime is being committed, who does nothing, and who neither then or before by any word or act encourages it, is not punishable though he mentally approves the crime." 1 Bish. New Crim. L., sec. 204. "A mere presence or presence combined with a refusal to interfere, or with concealing the fact, or a mere knowledge that a crime is about to be committed, or a mental approbation of what is done, while the will contributes nothing to the doing, will not create crime. In matter of evidence such facts have a greater or less weight according to circumstances, but in law there must be something a little further, as some word or act; or, in the language of COCKBURN, C. J., spoken, indeed, in a case where there was no presence, 'one to be a party to another's crime must incite, or procure, or encourage the act.'" 1 Bish. New Crim. L., secs. 632–634. Counsel has strenuously insisted that if the evidence for the territory was true, defendants were both guilty; if the evidence of the defendants was true, they were both innocent; and that it was not an issue as to the guilt or innocence of one of them, but of both. This was, no doubt, a fair argument to the jury, but whether that conclusion was right, was a matter for the jury; and while they may have believed a part of the testimony for the prosecution, they were under no obligations to believe all of it, nor were they bound to disbelieve all of the testimony of both defendants.

2. The eleventh instruction told the jury, that if the defendants made false statements as to the killing, it should be construed as tending to establish their guilt. This was going beyond a mere question of law, and it invaded the province of the jury. A false statement may under some circumstances become highly influential with the jury, but whether so or not, or in what degree, depends upon the time, or the circumstances under

INSTRUCTION: jury question.

which it was made, the particulars or importance of the falsity, whether knowingly uttered, and whether made from a consciousness of guilt or from motives of fear. All of these matters should be weighed by the jury in determining the effect of a false statement, and whether, in what degree, the conclusion of guilt is to be influenced by such falsity, falls entirely within the line of judgment reposed exclusively in the jury; and there is no rule of law requiring the jury to construe a false statement as tending to prove guilt. It is going beyond a direction to consider such falsity, if proved, and if knowingly made in relation to material facts, in connection with all the circumstances in ascertaining some essential element to be found; this instruction directs them to construe the bare fact of falsity a particular way. A presumption of law is a juridical postulate that a particular predicate is universally assignable to a particular subject (Whart. Crim. Ev., sec. 707); but this is quite different from an inference of fact drawn from argument, more or less sound, according to the particular circumstances surrounding it. Hickory v. U. S., 160 U. S. 409.

3. The twelfth instruction told the jury that public officials should be truthful, and that false statements by officers (i. e., defendants) in relation to their official acts should be construed as an aggravation of their offenses, and if knowingly and willfully made, would justify the jury in disregarding the whole of their sworn testimony in the case. In Pacific Gold Company v. Skillicorn, 8 N. M. 8, we held that an instruction which told a jury that they might disregard the whole of the testimony of a witness who had testified falsely, and which omitted the element of willful falsity, was error. It is not only essential that the falsity should be willful, but it must also be in relation to a material fact. 2 Thomp. Trials, sec.

STATEMENTS of officers in relation to official acts: instruction.

2423. The law does not demand a higher standard for the scrutiny and weighing of statements of fact by public officers, than other citizens; nor was it right to intimate that the defendants were guilty of any offenses which could be aggravated by their false statements concerning them.

4. A much more serious class of errors was committed in relation to instructions 14, 19, and 24, given at the request of the prosecution, which are as follows: "Fourteenth. In this case there is no presumption in favor of the defendants, Juan B. Romero or Sostenes Lucero, or either of them, but they are to be judged in the same manner as if they were not officers of the law, and had done the killing in question, which is admitted, without being armed with a writ or warrant, and after the killing has been established, which is not denied in this case, it devolves upon the defendants to establish that the killing done by them was either excusable or justifiable, and that there was no malice, express or implied in so killing."

MURDER: malice: presumption: onus: instruction.

"Nineteenth. If the jury believe that the defendants or either one of them, without the other objecting or protesting and standing by, shot and killed the deceased, under such circumstances, then, they would be guilty of murder in the first degree, unless they established the fact that they were excusable or justifiable by evidence to the satisfaction of the jury."

"Twenty-fourth. The court instructs the jury, that while it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged, that it is not required that the same shall be proved in every case literally as charged, such, for instance, as the date, which may be changed, which is not required to be proven of the date shown in the indictment, that if the material allegations of the indictment are substantially proven as charged therein,

the same will be sufficient, that nothing is to be presumed or taken by implication against the defendants, or either of them, until the fact of the killing has been established beyond a reasonable doubt, that then the killing is presumed to be malicious, and it devolves upon the defendants to establish to the contrary."

Is it true that the law implies malice from the fact of killing upon the trial on an indictment for murder? It is true that a jury would be at liberty to rest their verdict of guilt upon the fact of the killing by the defendant. But this conclusion of fact is quite different from a presumption drawn by law. "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." (Sec. 1, ch. 80, Acts 1891.) It must be (1) a killing and (2) with malice. The killing of a human being does not constitute murder, but, as BLACKSTONE says, "the grand criterion" which distinguishes murder from other killing, is that the killing must be with malice aforethought. 4 Black.'s Com. 198. Judge CHRISTIANCY observes, "to give homicide the legal character of murder all the authorities agree that it must have been perpetrated with malice pretense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes death. Without the concurrence of both, the crime can not exist; and, as every man is presumed to be innocent of the offense of which he is charged until he is proved to be guilty, this presumption must apply equally to both ingredients of the offense, to malice as well as the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof as to each rests equally upon the prosecution, though the one may admit and require more proof than the other." Maher v. People, 10 Mich. 212. It is true the rule that the law presumes malice from the proof of the killing is sustained by numerous and respectable authority. The leading authority is Com.

v. York, 9 Met. 93; (S. C., 2 Benn. Heard Lead. Crim. Cases, 504). But courts and commentators have, especially of late, denied it as a sound legal principle, and condemned it as an excrescence upon the law. The true rule more accurately stated, and which does not conflict with the presumption of innocence, the burden of proof, nor as to reasonable doubt, we think is, that malice may be implied from the intentional killing, where the jury from the whole case before them, and beyond a reasonable doubt, find the additional fact that no circumstances of justification or excuse appear, and when there are no circumstances mitigating the killing to that of manslaughter. If there is reasonable doubt as to justification there is reasonable doubt as to malice. The evidence of the killing may be considered by the jury together with the whole of the evidence, in ascertaining whether there was malice; but it would be error to tell the jury that the killing alone is presumptive evidence of malice aforethought, as it would allow the jury to find malice, without stopping to inquire whether a considerable provocation appeared, or whether the circumstances were such as to show a wicked and malignant heart, which are essential ingredients of implied malice. In discussing this subject, Mr. WHARTON observes: "We must keep in mind that the doctrine that malice and intent are presumptions of law, to be presumed from the mere fact of killing, belongs, even if correct, to purely speculative jurisprudence, and can not be applied to any case that can possibly arise before the courts." Wharton, Crim. Ev., sec. 737. This is so because in no case does the prosecution limit its proofs to the bare fact of a killing; there is always disclosed some surrounding circumstances, tending to show how and why it was done; it is from the killing and all the circumstances disclosed upon the whole case that the jury determine whether malice has been made out beyond a reasonable doubt. It is true that we hear occa-

sional utterances as in Massachusetts, of the old doctrine that malice is to be presumed from the mere act of killing; but whenever this is done it is followed by the admission that when the facts of killing are proved, then the malice is to be inferred from the facts. Now as the facts of the killing are always proved the idea of abstract malice, being presumed from the abstract killing, has no application to the cases before the court." Whart. Crim. Ev., secs. 722–738. And Mr. WHARTON adds: "Should, however, the judge make the proposition not speculative, but regulative—should he direct the jury that the logical inferences of this class are presumptions of law, and tell them to presume malice from the act of killing, then this would be error." Whart. Crim. Ev., sec. 738. That is exactly what was done in this case, and indeed the foregoing instructions went even further; they not only told the jury that malice was to be presumed from the killing but that it devolved upon the defendants to establish the contrary. What is implied malice? "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart." Sec. 3, ch. 80, Acts 1891. Implied malice does not, therefore, arise merely from an intentional killing, but from a killing under such circumstances as that the jury can say, that no considerable provocation appeared, or that all the circumstances show a wicked and malignant heart. In State v. Vaughan, 39 Pac. Rep. 733, the defendant admitted the killing, and claimed self-defense in justification; it was held error to charge that "malice aforethought means an intention to kill." BIGELOW, C. J., says: "The fact that the killing was intentional does not necessarily prove that it was done with malice; for an intentional killing may be entirely justifiable, as where it is done in necessary self-defense, or it may be only manslaughter, as where it is done in the heat of passion caused by no

sufficient provocation. What it is must depend on the manner of the killing, and the surrounding circumstances." And the court in that case points out that inasmuch as the defendant admitted the killing, it was important that the instructions upon this matter should be correct, and that such an instruction was highly prejudicial under the circumstances. Dennison v. State, 13 Ind. 510; State v. McKenzie, 102 Mo. 620; Tremble v. Ty., 3 Wyo. 280 (21 Pac. Rep. 1081); State v. Wingo, 66 Mo. 181; People v. Willett, 36 Hun. 500. The element of implied malice was not merely formal; it involved the real and vital questions contested before the jury in this case. The evidence for the prosecution tended to show that the killing was done without provocation, and was a result of a deliberate purpose, under cover of a pretended arrest and pretended resistance; the evidence for the defense tended to show that the killing was done under circumstances of considerable provocation, after deceased had actually attempted to secure his freedom by slaying his guards. It was for the jury to determine which side spoke the truth. The jury was told that malice was to be implied from the killing, and that the killing by the defendants was established; and therefore the jury were told in effect, that malice was fully proved, while the evidence for the defense went directly to attack the essential element of implied malice as defined in the statute.

It will be remembered that the actual killing was done by one of the defendants, yet the jury were told in the fourteenth instruction that the killing done by the "defendants" was established; the instruction then goes on to say, that it devolves on the defendants to establish that the "killing done by them" was either excusable or justifiable, and that there was no malice express or implied in the killing. Even if it be true that the law imputes malice to him who kills another, the vice running through these instructions is that the

legal presumption is raised against both of the defendants, and it is not confined to the one who fired the fatal shot; and in all of them the jury were told that the burden rested upon both defendants, and not merely upon the one who fired the shot, to prove want of malice and excuse or justification; in the nineteenth they were told that justification or excuse must be established by the defendants, by evidence to the satisfaction of the jury.

Even though it be true, that the law implies malice from the simple fact of the killing, and even though both defendants had actually participated in the killing, these instructions treat the presumption arising from the killing as though the burden of proof became thereby shifted from the prosecution on to the defendants; the presumption of innocence until guilt is established to the satisfaction of the jury is thus completely brushed away. The defendants were required to prove their innocence as to one of the material and essential elements of the crime of which they were charged, namely, that the killing was not done with malice express or implied. In State v. Payne, 39 Pac. Rep. 157, the Nevada court while holding to the old doctrine, that malice may be presumed from a killing done with a deadly weapon, say: "Of course it would not be proper to instruct the jury that it was incumbent upon the defendant to overthrow this presumption by testimony in his own behalf." When counsel for the territory drew instruction number 24, in which the jury were told, that not only was malice to be presumed, but that it devolved upon the defendants to show the contrary, he confounded a mere rule of procedure touching the order of proofs, with the functions of the jury in weighing the testimony, and applied to the latter a rule relating merely to the former. Whart. Crim. Ev., sec. 330–738. The proofs of the prosecution no doubt made out a prima facie case, amply

strong enough to convict; when the defense introduced evidence in explanation and denial they became actors, but upon the submission of the case it was for the jury to say upon the whole case whether every element was established beyond a reasonable doubt, and if not, to acquit. The presumption of innocence did not end at any particular period in the proofs; it continued throughout the trial, and did not terminate until, upon the whole case, the jury returned their verdict. Whart. Crim. Ev., secs. 330-331; Coffin v. U. S., 156 U. S. 432; Davis v. U. S., 160 U. S. 469. "In a criminal case, the establishment of a prima facie case only does not take away the presumption of a defendant's innocence, nor shift the burden of proof." Agletree v. State, 28 Ala. 693; 1 Bouv. Dic. 227. Suppose the defendants had not introduced any testimony, although they were legally entitled to demand that the jury find every element established beyond a reasonable doubt, yet if the instructions like the fourteenth and twenty-fourth were given, it would be tantamount to directing them to find a verdict of guilty, even though the testimony of the prosecution's witnesses may have been such as to leave a reasonable doubt of guilt. If the proposition announced in these instructions be correct, the proof of the killing would not only raise a presumption of malice, but that presumption would become proof beyond a reasonable doubt as a matter of law, unless the defendant successfully assumed the burden of showing the contrary. Such a proposition overturns the fundamental principles of the criminal law. In Chaffee v. U. S., 18 Wall. 516, the jury had been charged that the government need only prove that the defendants were presumptively guilty, and the duty then devolved upon them to establish their innocence, and if they did not, they were guilty beyond a reasonable doubt. Justice FIELD, speaking for the court, says: "We do not think it at

all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The instruction sets at naught established principles." In Coffin v. U. S., 156 U. S. 432, the jury had been charged that when the prohibited acts were knowingly and intentionally done and their natural and legitimate tendency was to produce injury, the intent to injure is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful and their acts legitimate.

The supreme court per Justice WHITE, say, "The error contained in the charge which said substantially that the burden of proof had shifted under the circumstances in the case, and that, therefore, it was incumbent on the accused to show the lawfulness of their acts, was not merely verbal, but was fundamental." While the case of the prosecution made up in part by legal presumptions may be such as to render it expedient for the defense to produce some evidence to qualify, explain or deny the facts from which the presumption is sought to be raised, the burden of proof is not thereby changed; and even if the law permits the jury to infer malice from certain things, it does not require them to do so. People v. Willett, 36 Hun. 500. The presumption of innocence is itself to be considered as evidence in favor of the defendants in every criminal case under a plea of not guilty. Coffin v. U. S., 156 U. S. 432; Davis v. U. S., 160 U. S. 469. Upon this principle it is easy to reconcile the rule that in no case can the judge peremptorily direct the jury to find a defendant guilty of a crime. Sparf v. U. S., 156 U. S. 51. "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, nor to disprove the facts necessary to establish the crime of which he is indicted. It is on the prosecution from the be-

ginning to the end of the trial, and applies to every element necessary to constitute the crime." Davis v. U. S., 160 U. S. 469. In State v. Wingo, 66 Mo. 364, the trial court had charged that "if the defendant Wingo shot and killed Gamble the law presumed it to be murder in the second degree in the absence of proof to the contrary, and it devolved upon the defendant to show from the evidence in the cause to the reasonable satisfaction of the jury that he was guilty of a less crime, or acted in self defense." The supreme court held the charge erroneous, saying: "The defendant is entitled to the benefit of a reasonable doubt of his guilt on the whole case, not only as to whether the case made by the state is open to reasonable doubt, but if the evidence for the state be clear, and, in the absence of other evidence conclusive, still if the evidence adduced by the accused, whether it establishes the facts relied upon by a preponderance of the evidence, or not, creates a reasonable doubt of his guilt in the minds of the jury, he is entitled to an acquittal. At no stage of the trial does he stand asserting his innocence." In the Stokes case, 53 N. Y. 164, after an elaborate argument upon this subject, it was held that the jury must be satisfied from the whole evidence of the guilt of the accused, and it was clear error to charge them that when the prosecution has made out a prima facie case and evidence has been introduced tending to show a defense, that they must convict unless they are satisfied of the truth of the defense. "Such a charge," says the court, "throws the burden upon the prisoner, and subjects him to conviction though the evidence on his part may have created a reasonable doubt of his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict unless they are satisfied that he has proved his innocence." In State v. Gassert, 65 Mo. 354, Judge HENRY alluded

to the difficulty of reconciling the doctrine contained in such instructions as these with elementary principles, but yielded to the force of precedents in that state; but in State v. McKenzie, 102 Mo. 620, it was repudiated and the earlier cases overruled. See, also, State v. Wingo, supra; State v. Hill, 69 Mo. 453; but in State v. Evans, 121 Mo. 411, it seems to have been restored. In Massachusetts the case of Com. v. York, supra, has been greatly modified if not overruled in Com. v. Pomeroy, reported Whart. Hom. [2 Ed.] 753, appendix, and is so considered by the supreme court of the United States in Davis v. U. S., 160 U. S. 481. See, also, Com. v. Hawkins, 3 Gray, 463; U. S. v. Armstrong, 2 Curt. C. C. 445.

The only case which we have found in this territory which seems to hold that the defendant must prove hisi nnocence of the crime charged, is Trujillo v. Territory, 7 N. M. 44, where it was held that the burden was upon the defendant to prove an alibi, but that ruling is not sustained by sound principle (Whart. Crim. Ev. 333), and is at variance with the rule laid down in Davis v. U. S., 160 U. S. 469; an alibi, if true, meets and completely overthrows every allegation against the accused in the indictment. 2 Thompson Trials, section 2436. Extrinsic defenses which do not traverse the averments of the indictment, it is perhaps true, must be affirmatively shown by the defense; of this class have been mentioned such as autrefois acquit, license, command of superior officer, etc. Whart. Crim. Ev., sec. 331, et seq. But such matters of provocation, excuse or justification which tend to traverse the element of intent or malice must be weighed by the jury not as a defense, but with all the other evidence in determining whether every essential element of the crime has been established beyond reasonable doubt. Whart. Crim. Ev., sec. 331; State v. Porter, 34 Iowa, 131; State v. Hill, 69 Mo. 451;

People v. Marshall, 44 Pac. Rep. (Cal.) 718; People v. Coughlin, 32 N. W. Rep. 905; Coffin v. U. S.; Davis v. U. S., and Hickory v. U. S., supra.

The court in its own prepared charge fairly and correctly instructed the jury in general terms as to the burden of proof, the presumption of innocence and the necessity of establishing guilt as to every element, including malice, beyond a reasonable doubt, and it is argued that these instructions considered, the defendant was sufficiently protected against those given at the instance of the prosecution. But more than sixty instructions were given to the jury in this case, many of them quite lengthy, and it would hardly be fair to assume that mere abstract propositions would be weighed to the exclusion of those to which we have alluded, which assume to deal with the facts of this particular case, which were specified, which emphasized by repetition, and which were of a nature so harmful to the defendants. In this case the errors were of such character that the probability of injury seems quite manifest. 2 Thomp. Trials, sec. 2407; People v. Casey, 65 Cal. 260. It will not be necessary to notice the other errors assigned as these are sufficient to require the reversal of the cause. The judgment is reversed and the cause remanded for a new trial.

SMITH, C. J., and COLLIER and HAMILTON, J. J., concur.

[No. 649. September 1, 1896.]

PERFECTO PADILLA, PLAINTIFF IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT IN ERROR.

CRIMINAL LAW—INSTRUCTIONS—PRACTICE, APPELLATE.—Instructions in a criminal case, not excepted to below, are not reviewable in the appellate court.

ERROR, from a judgment of conviction for murder, to the First Judicial District Court, Rio Arriba County. Affirmed.

The facts are stated in the opinion of the court.

CHARLES A. SPIESS for plaintiff in error.

The defense of alibi needs only to be established to the extent of raising in the minds of the jurors a reasonable doubt as to its truth, and the burden is never on the defendant to prove the same. Toler v. State, 16 Ohio, 583; Fife v. Comm., 9 Pa. St. 429; French v. State, 16 Ind. 670; Pollard v. State, 15 Miss. 410; Chappell v. State, 7 Colo. 92; Gibbs v. State, 1 Tex. App. 12; Otmer v. People, 76 Ill. 149; Howard v. State, 50 Ind. 190; Comm. v. Choate, 105 Mass. 451; State v. Storms, 94 N. C. 973; State v. Chee Gong, 16 Ore. 534; People v. Chun Heong, 86 Cal. 309; People v. Nelson, 85 Id. 421; State v. Shroyer, 104 Mo. 441; Mullens v. People, 110 Ill. 442; State v. Freeman, 100 N. C. 429; People v. Stone, 117 N. Y. 480; Hogue v. People, 117 Ill. 35; Blankenship v. State, 55 Ark. 244; Walters v. State, 39 Ohio St. 215; Rudey v. Comm., 108 Pa. 500. See, also, Davis v. U. S., 160 U. S. 469; State v. Reed, 62 Iowa, 40, per ADAMS, J.

JOHN P. VICTORY, solicitor general, for the territory.

Alibi, like insanity, is an affirmative defense, and the burden of proof is on the defense to establish it by a preponderance of evidence. Thomp. on Trials, sec. 2437; Comm. v. Webster, 5 Cush. 296, 323, 324; State v. Vincent, 24 Iowa, 570, 578; State v. Hardin, 46 Id. 623, 629; State v. Red, 53 Id. 69; State v. Reed, 62 Id. 40; State v. Kline, 54 Id. 183; State v. Northrup, 48 Id. 583; State v. Hamilton, 11 N. W. Rep. (Iowa) 598.

No motion was filed or made for a new trial in the court below, and this court will not review an alleged erroneous decision where the objection to it is not specifically pointed out on a motion for new trial. Territory v. Anderson, 4 N. M. (Gil.) 213; State v. Williams, 13 Wash. 335.

COLLIER, J.—This cause comes up to this court upon writ of error, the plaintiff in error, Perfecto Padilla, having been convicted in the district court of the county of Rio Arriba of murder, as charged in the indictment, and sentenced to be hanged.

The indictment charges, in an exclusive way and by apt averments, the crime of murder in the first degree, and the verdict needs no other aid than the indictment for a clear understanding of its import and meaning. All the proceedings had and apparent upon the record proper show due procedure in the cause, and, therefore, the judgment of the lower court should be affirmed, unless other error duly excepted to and the exception saved and incorporated in a bill of exceptions is reviewable here and is adjudged reversible.

There is a bill of exceptions made a part of the record in the cause, but it includes merely the testimony of the defendant given on the trial of the case

with some minor exceptions to the rulings of the court upon objections made, and the instructions of the court to the jury, as to which no exceptions were taken; and the bill of exceptions fails to show that any motion for new trial was made in the cause.

The only error alleged here is to the instruction of the court upon the subject of ALIBI testified to by defendant. In Territory v. O'Donnell, reported in 4 N. M. (Gildersleeve) 208; and Territory v. Baker, Id. 238, this court held, even where there is a motion for a new trial in the trial court, that where no objection or exception was shown by the record to have been made to the instructions, they could not be considered here. It is specifically held that our statute requiring exception to be taken at the time of the court's decision applies as well to criminal as to civil cases. Comp. Laws, sec. 2197. Several decisions of our own court are cited in that case to the same effect, such as Territory v. Yarberry, 2 N. M. 391; Leonardo v. Territory, 1 N. M. 291; Coleman v. Bell, 4 N. M. 21, and decisions from many states, and others from the United States Supreme Court, e. g., U. S. v. Breitling, 20 How. 352; Wood v. Weimer, 104 U. S. 786.

. Since the O'Donnell and Baker cases this court has frequently enforced the plain provisions of our statute as to the taking of exceptions as see Sierra Co. v. Dona Ana Co., 5 N. M. 190, and the case of Laird v. Upton, handed down at this term.

As to whether rulings upon questions of law decided in the progress of the cause, and not in the record proper, can be reviewed at all without motion for a new trial, notwithstanding there is a bill of exceptions, no case of this court has been called to our attention. There is abundant authority in support of the contention, that the trial court must be given an opportunity to review its rulings made on the trial be-

fore they will be considered here. Facts in evidence will not, this court has decided, be considered on review without such motion. Spiegelberg v. Mink, 1 N. M. 308; Sierra Co. v. Dona Ana Co., supra. Among the authorities called to our attention that no questions arising on the trial will be considered in appellate courts without motion for new trial having been made, we cite: Elliott's Appellate Procedure, sec. 242; State v. Swartz, 9 Ind. 221; Starns v. State, 61 Id. 360; State v. Martin, 8 S. W. Rep. (Mo.) 217; Story v. Ragsdale, 30 Mo. App. 196; Alpers v. Scannell, 7 Colo. 590; Harrington v. Latta, 36 N. W. Rep. (Neb.) 364; Sanborn v. Murphy, 25 S. W. Rep. (Tex.) 459; Oney v. Clanderin, 28 W. Va. 34.

It however is not necessary to decide this question, as both by our statute and repeated adjudications of this court thereon, the error complained of not having been excepted to, can not be here reviewed.

The act of 1889, chapter 1, section 4, in nowise changes the rule on this subject, as has been recently held by the United States supreme court in Grayson v. Lynch on appeal from this court, and reported in United States Supreme Court Reporter, volume 16, number 30.

Finding no error in the record, this cause is accordingly affirmed.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

[No. 682. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. AGUSTIN LERMO, APPELLANT.

CRIMINAL LAW—JURY, PETIT—CHALLENGES.—In a capital case, when less than twelve jurors are in the box, and the regular panel is exhausted, to compel defendant to pass peremptorily on such jurors, before a special venire is drawn, qualified, and the names are in the box, from which the clerk may draw, and fill the panel, is reversible error. Laws 1889, p. 26, sec. 24; Territory v. Barrett, 8 N. M. at p. 77.

ID.—MURDER—CIRCUMSTANTIAL EVIDENCE, FAILURE TO INSTRUCT AS TO. In a murder trial, where the evidence was wholly circumstantial, it was the duty of the court to instruct the jury fully as to the law of circumstantial evidence, and its failure to do so was prejudicial to the rights of defendant.

ID.—MURDER—CIRCUMSTANTIAL EVIDENCE—REFUSED INSTRUCTION.—In such case, an instruction offered by defendant that where circumstances alone are relied on for a conviction, they must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than that of defendant's guilt, and must satisfy the jury of his guilt beyond a reasonable doubt, fairly presented the law, and should have been given.

APPEAL, from a judgment of conviction for murder, from the Fifth Judicial District Court, Eddy County. Reversed, and new trial granted; COLLIER, J., and BANTZ and HAMILTON, JJ., concurring in the result.

The facts are stated in the opinion of the court.

A. A. FREEMAN and A. S. BATEMAN for appellant.

While the precise question may not have been at issue there, it was strongly intimated by this court in a recent decision that it understood the rule to be that a defendant in a capital case could not be required to exercise his peremptory challenges on a body composed

of less than twelve jurors or a full panel. Territory v. Barrett, 8 N. M. 70.

The court erred in refusing to give a proper charge on the subject of circumstantial evidence, and the instruction offered by defendant. Comm. v. Webster, 5 Cush. 317; Clare v. People, 9 Colo. 124; Scott v. State, 19 Tex. App. 331; 24 Pac. Rep. 1006; 2 Thomp. on Trials, 2511, 2512, 2513; Johnson v. State, 18 Tex. App. 385; Walbridge v. State, 13 N. W. Rep. 209; U. S. v. Wright, 16 Fed. Rep. 112; Schuster v. State, 27 Ind. 394; U. S. v. Cole et al., 5 McLean, 601; U. S. v. Williams, 2 Id. 259; Sumner v. State, 5 Blackf. 580; Turner v. State, 4 Lea, 207; People v. Murray, 41 Cal. 67; Dassett v. U. S., 41 Pac. Rep. 608, and citations; State v. Gleim, 41 Pac. Rep. (Mont.) 998.

JOHN P. VICTORY, solicitor general, for the territory.

Known or obvious irregularity in the process of impaneling a jury must be objected to at the time, and not on motion for a new trial or in arrest of judgment. 1 Thomp. on Trials, sec. 113, and citations; State v. Slack, 1 Bailey (S. C.), 330; Comm. v. Stowell, 9 Metc. (Mass.) 572; Bristow's Case, 15 Gratt. (Va.) 634; Clough v. State, 7 Neb. 320; Gardenshire v. State, 6 Tex. App. 147, 151; Boyd v. State, 17 Ga. 194; State v. Ward, 2 Hawks (N. C.), 443; Dayharsh v. Enos, 5 N. Y. 531; State v. Brown, 12 Minn. 538; James v. State, 53 Ala. 380.

When all the instructions, taken together, give a correct statement of the law applicable to the facts of the case, they will be held good, though some of them do not contain in themselves the proper limitations and conditions required by the facts. People v. Clark, 24 Pac. Rep. 313; U. S. v. Tenney, 11 Id. 472; U. S. v. Christofferson, Id. 480.

LAUGHLIN, J.—The defendant, Agustin Lermo, was indicted, tried and convicted of murder in the first degree, at the November, 1895, term of the district court for the county of Eddy in this territory, on the charge of having on the ninth day of May, 1894, shot and killed Assaa Toma. After motions for a new trial and in arrest of judgment had been heard by the court and denied, the defendant was sentenced to be executed in the manner prescribed by the law; from which rulings of the court an appeal was prayed and granted, and the case is here for determination on the alleged errors in the court below.

The record discloses that all the facts in this case upon which appellant was convicted were purely circumstantial. It appears that the body of the deceased, Assaa Toma, was found some seven or eight hours after the supposed time of the homicide in the bed or channel of the Delaware river, which at the time was dry, with a coat and some weeds thrown over it, with a gunshot wound in the head and one in the body and one in the arm, with indications on the ground that deceased had been killed at the wayside and the body dragged some distance from the place of the killing, and there partially concealed. Some ten days after homicide defendant was arrested in the state of Texas, and a watch identified as the property of the deceased found in his possession. And also some articles of jewelry concealed on the inside of the vest of the defendant and a number of other articles such as are usually sold by peddlers were also found in defendant's possession at the time of the arrest. It also further appears that the deceased was an Assyrian peddler, and was seen in the neighborhood of the place of the homicide plying his trade the morning of the day that the body was found in the afternoon about 3 or 4 o'clock.

The defendant did not testify nor did any witness testify in his behalf. The testimony upon which defendant was found guilty of murder in the first degree was purely circumstantial, as there was no eyewitness to the homicide, nor was the defendant seen in the neighborhood of the place where the killing occurred or at or near the time when it is supposed to have taken place. The possession of deceased's watch by the defendant and his flight, both of which facts were unexplained by the defendant, were the most damaging, and in fact almost all the testimony in the record which authorized a conviction in the case.

The record and bill of exceptions in this case are in so bad a condition, and so carelessly prepared that it is almost impossible to ascertain with any degree of certainty just what was done in the matter of taking exceptions in the court below during the proceedings of the trial.

On page 3 of what purports to be the bill of exceptions we find this entry:

"The regular panel of the petit jury having been exhausted by reason of the challenges exercised by the parties, the plaintiff asks the court to require both parties to pass peremptorily on the jurors in the box before issuing a special venire. Which motion is by the court sustained. Whereupon the defendant then and there duly excepted."

And on page 7 of what seems to be the record INTER ALIA we find this:

"And both parties announcing themselves ready for trial, the following named members of the petit jury are duly drawn, accepted and impaneled, to serve as jurors for the trial of the issues joined in this cause pending, to wit: A. J. Allen, W. L. Webster, J. S. Crozier, John Ruark, A. J. Froman, J. C. Anderson," thus leaving only six jurors in the box when the special venire was ordered.

Then follows an order for drawing and serving a special venire. But there is no mention of this error, for such it is, in the motion for a new trial, and it was not called to the attention of the trial judge, and he was given no opportunity to correct his rulings on this exception, the very purpose for which a motion for a new trial is made and intended. People v. Phipps, 39 Cal. 326.

The error above referred to is assigned as the second error in appellant's brief and authorities cited in support thereof. The language of the statute on that subject is as follows: "Section 24. * * * Provided, further, that no defendant shall be required to exercise any peremptory challenge as to any particular juror until the territory shall have finally passed upon and accepted such juror." Laws 1889, page 26.

JURY, petit: challenges.

The defendant is entitled to have the full panel in the box all the time, and he is not required to exercise any peremptory challenge on any one of the jurors until the prosecution has accepted the juror. And where the regular panel in the box is reduced to eleven men then the defendant is not required to proceed further, when the regular panel becomes exhausted, until a special venire is drawn, qualified and the names are in the box from which the clerk may draw and fill the panel in the jury box. This was so held in this court. Territory v. Barrett, 8 N. M. 70 But the record, bill of exceptions and motion for new trial was, in that case, if possible, in a worse condition than in this case; and it was shown in that case that defendant's counsel did not as in this case, object, and took no exception, and the error could not be availed of by the defendant or the court. The error complained of here is clearly reversible, and if there were no other errors sufficient to sustain a reversal it might, in a case of this gravity, be available on review.

The facts in the case being purely circumstantial, it was the duty of the court to instruct the jury fully on the law of circumstantial evidence; this the record shows the trial court did not do, and by reason of such failure manifest error prejudicial to the rights of the defendant has intervened and the case must be reversed.

MURDER: circumstantial evidence, failure to instruct as to.

Counsel for appellant requested the court to give the following instruction, to wit: "The court instructs the jury that where circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other hypothesis than the defendant's guilt, and they must satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt."

CIRCUMSTANTIAL evidence: refused instruction.

This instruction fairly stated the law and the weight to be given to circumstantial evidence, where there is no direct evidence, and to exclude it from the jury was error, especially where there is no other instruction given substantially covering the same subject. The history and experience of criminal jurisprudence establishes that two essential elements in the case must be proved. First, the identity of the CORPUS DELICTI, and, second, the identity of the accused, before a conviction in any grade is warranted. 3 Green. Ev. 30. And while these essential facts may be proved by circumstantial evidence, yet it is a well established principle that it is necessary to caution the jury in a proper instruction as to the weight and effect to be given the circumstances detailed by the witnesses, to establish these first and most important elements tending to establish the crime as charged. Turner v. State, 4 B. J. La. 206; Dasset v. United States, 41 Pac. Rep. 608; Com. v. Webster, 5 Cush. 317; Graver v. People, 32 Pac. Rep. 63; People v. Murray, 41 Cal. 66.

"We are further of the opinion that inasmuch as the evidence in the case was wholly circumstantial, the jury should have been instructed as to the nature and conclusiveness of that character of testimony to warrant a conviction upon it." Struckman v. State, 7 Tex. App. 581; People v. Phipps, 39 Cal. 326.

For the foregoing reasons the judgment of the lower court is reversed, and a new trial granted. And an order will be made accordingly.

COLLIER, J. (concurring).—I concur in the reversal of this case especially upon the ground of the court's failure to instruct as to circumstantial evidence, as to the selection of the jury. I concur only for the reason that this procedure should be considered as established by Territory v. Barrett, supra. I am not prepared to say that, under the act of 1889, this manner of selection was not authorized.

HAMILTON, J. (concurring).—I concur for the reason given by Justice COLLIER.

BANTZ, J. (concurring).—I concur in the reversal of this cause because the record does not show that an instruction as to circumstantial evidence was given.

[No. 662. September 1, 1896.]

DIONICIO SANDOVAL, PLAINTIFF IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT IN ERROR.

CRIMINAL LAW—MURDER—EVIDENCE—INSTRUCTION.—On a trial for murder, where two witnesses for the prosecution, present at the killing, testified that defendant came to the camp of deceased, armed with a rifle, and, on deceased's saying to defendant that he had not delivered to him all his sheep, defendant called him a liar, and shot him, and defendant testified that deceased called him a liar, and then caught hold of the rifle, and attempted to take it away from defendant, when the rifle was accidentally discharged, and killed deceased.—*Held*, that the court properly refused to give instructions either in the second or third degrees.

ID.—MURDER—EVIDENCE—DEGREES—INSTRUCTIONS.—In such case, where the evidence showed murder in the first degree, or excusable homicide, and proper instructions were given on these degrees, an instruction which told the jury that in rendering their verdict they must either find defendant guilty of murder in the first degree, or that he was not guilty, was a proper instruction.

ERROR, from a judgment of conviction for murder, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

EDWARD L. MEDLER and G. W. JOHNSTON for plaintiff in error.

The court erred in confining the jury to either a verdict of murder in the first degree, or an acquittal. The jury should have been instructed as to murder in the second and third degrees and allowed to deliberate as to these forms of verdict. Kelner v. State, 63 Am. Dec. 269; State v. Benham, 23 Iowa, 154; State v. Benham, 92 Am. Dec. 417; People v. King, 87 Id. 95; Ex parte Sloan, 11 S. Rep. 14; State v. O'Hara, 4 S. W. Rep. (Mo.) 422; 2 Bish. Crim. Law, sec. 679;

State v. Curtis, 70 Mo. 595; State v. Ellis, 74 Id. 207; State v. Holme, 54 Id. 153; Liskosski v. State, 3 S. W. Rep. 698; Robbins v. State, 8 Ohio St. 193; Beaudine v. State, Id. 638; Rhodes v. Comm., 46 Pa. St. 398; Lane v. Comm., 59 Id. 375; Shaffner v. Comm., 72 Id. 61; Fogg v. State, 50 Ark. 506; State v. Carr, 53 Vt. 37; 2 Bish. Crim. Prac., sec. 642; Adams v. State, 29 Ohio St. 412; 2 Whar. Crim. Law, sec. 1112; State v. Lindsey, 5 Pac. Rep. 822; Marshall v. State, 32 Fla. 462; Keener v. State, 63 Am. Dec. 269; State v. Turner, Wright (Ohio), 20; People v. Foren, 25 Cal. 361; Craft v. State, 3 Kan. 450; State v. Crabtree, 20 S. W. Rep. 7; Hapt v. Utah, 110 U. S. 582; State v. Perigo, 45 N. W. Rep. (Iowa) 399; State v. Berkley, 4 S. W. Rep. 24; Territory v. Friday (N. M.), Oct. term, 1895.

JOHN P. VICTORY, solicitor general, for the territory.

The court did not err in instructing the jury that their verdict should be guilty of murder in the first degree or not guilty. Territory v. Young, 2 N. M. 93, 104; Territory v. Thomason, 4 Id. (Gil.) 154; Sharf v. U. S., 156 U. S. 51; State v. Lane, 64 Mo. 319–324; State v. Musick, 101 Id. 260; Robinson, 84 Ga. 674; State v. Estep, 44 Kan. 572–575; O'Brien v. Comm., 89 Ky. 354.

It is the duty of defendant when dissatisfied with the instructions given by the court on any point to offer a proper instruction covering that point. This was not done in this case, and defendant has no right to complain. Territory v. O'Donnell, 4 N. M. (Gil.) 196 and citations.

Even if an instruction was asked by defendant that, if defendant killed deceased in the heat of passion, the offense would not be murder in the first degree, the same would be refused by the court, because

there was no evidence in the case to justify or require it. Territory v. Anderson, 4 N. M. (Gil.) 214; Territory v. Baker, Id. 236.

LAUGHLIN, J.—The plaintiff in error, Dionicio Sandoval, was indicted for murder in the first degree, on an indictment charging him with having on the twenty-ninth day of July, 1895, at the county of Bernalillo in said territory of New Mexico, shot and killed one Victoriano Tenorio.

At the October, 1895, term of the district court for said county, the said Dionicio Sandoval was tried and found guilty of murder in the first degree; and after motions for new trial and in arrest were made, argued and denied, defendant was sentenced to be hanged, and error was sued out and stay of execution was granted, and the case is here on errors assigned in the court below, and such as are deemed pertinent to the proper decision of the case will be considered in the opinion.

There are some thirty-six errors assigned for reversal, by plaintiff in error's counsel, but only such of these will be considered as seem necessary for the proper determination of the case. There were only three witnesses who testified in this case, and they were all eyewitnesses to it, and within a few yards of the place where the homicide occurred; two testified in behalf of the prosecution, and the defendant only in his own behalf. There is no dispute as to the place where or the time when the shot was fired which killed the deceased, Victoriano Tenorio; nor is there any dispute as to whose gun it was from which the fatal shot was fired, nor as to where the fatal bullet entered the body of the deceased. The facts are clearly shown by the testimony of all the witnesses.

The only controversy shown by the testimony is as to how the gun was fired.

The testimony of all the witnesses shows that the

deceased, the defendant, and the two witnesses for the prosecution, were all sheep-herders, and that on the evening and a short time prior to the occurrence of the homicide, the defendant whose flock and sheep-camp was some two or three miles distant from the place of the homicide, came with a forty-four caliber Winchester rifle, to the camp-fire of the deceased, about 7 or 8 o'clock in the evening, and after saluting the deceased and the two witnesses who were near the camp-fire the defendant took a seat upon a water keg with his rifle by him, and the witnesses for the prosecution testify, "that deceased asked defendant to be seated upon some sheep-skins," which defendant declined to do, saying, "he was all right where he was, and was doing no harm;" then deceased said "no, but I suppose you will be more at ease lying on the sheep-skins. Then Donicio Sandoval (defendant) told Victoriano Tenorio (deceased) what was the reason he had said on his count he had so many lambs in his fold without any dames or mothers,—mavericks; and Victoriano answered, I didn't say that; what I did say was, you didn't deliver to me all my sheep. Then Dionicio Sandoval said: You are a liar. And he said, I don't lie. And then he, defendant, shot." These are substantially the same facts testified to by the other witnesses for the prosecution. The testimony further shows that the fatal bullet entered near the armpit of the deceased, and he fell to the ground and died immediately, and only said after he was shot, "take hold of me." It further appears from the testimony on the part of the prosecution, the deceased was sitting down at the time he was shot, and that the defendant was standing up. This state of facts makes out a clear case of murder in the first degree beyond any doubt, as defined by our statute on that subject; and the instructions given by the court below on murder in the first degree was full and sufficient on that degree.

The testimony of the defendant in his own behalf on this particular point is as follows, to wit:

"Q. Were you camping that night close—how far were you camping from the deceased's camp, Victoriano Tenorio? A. About three miles.

"Q. Did you go to the camp that night of Tenorio? A. Yes, sir.

"Q. State what you saw. A. I told him I went over there to tell him to fix his camp in the corral, to await the boss; that I would fix my corral on one side, and to ask him, also, why was he talking about me touching my honor without any cause.

"Q. What was said and done after you got there? A. He told me then that I lied, and he said what had I to say about him that I was so and so, touching my credit.

"Q. Just tell what was said. A. Then he jumped up as though to strike me, and then he got hold of the rifle and in the twist we gave it in getting up the gun went off, and he was shot. I didn't do it intentionally."

On cross-examination the defendant testified as follows, to wit:

"Q. Did you level your gun on him then, or which way did you hold your gun? A. I had my rifle on one side, and when he came upon me, I took hold of the rifle, and we got to struggling for the rifle.

"Q. Where did he grab the rifle? A. He didn't, I had it.

"Q. Didn't he grab hold of it? A. When I kinder got out and he caught hold of the rifle, and he wanted to take hold of me and we struggled for it, and in the twist we made the rifle went off.

"Q. Where did he catch hold of the rifle? A. Right on the other side of me, straight as we had it.

"Q. Where did you have the rifle? A. I had the barrel.

"Q. Did you pick it up by the barrel when you picked it up? A. I took hold of it about the middle of the rifle, about where the cartridge boxes are.

"Q. Did you have hold of it with one hand or both? A. No, I had it sitting by one side of the keg.

"Q. When you picked it up did you pick it up with one hand or with both hands? A. With one hand, and then he caught hold of it himself, and then we both had the rifle.

"Q. Which hand did you pick it up with? A. With the left.

"Q. You took it about the middle, then did you take hold of it with your right hand, too? A. Yes, sir; by the barrel.

* * * * * * * * *

"Q. You are right handed when you shoot, do you shoot from your right shoulder? A. On the right side.

"Q. You say he grabbed hold of the barrel also? A. Yes, sir.

"Q. With his hands outside of yours, or between your hands? A. One of his hands he had in the middle and the other over here (witness illustrates).

"Q. And he had hold of the gun toward the end? A. Yes, sir.

"Q. And in the scuffle you don't know how the rifle went off? I do not know.

"Q. Did you pull the trigger? A. (Witness illustrates) I do not know how the rifle cocked itself, perhaps in the struggle we had there it got cocked and went off."

On this testimony counsel for plaintiff in error contend that the court should have instructed the jury with respect to murder in the second and third degrees. The statute defines murder in the second degree as follows, to

MURDER: evidence: instruction.

wit: "Sec. 5. All murder which shall be perpetrated without a design to affect death, by a person while engaged in the commission of a misdemeanor, or which shall be perpetrated in the heat of passion without design to affect death, but in a cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide, or which shall be perpetrated unnecessarily, either while resisting an attempt by the person killed to commit any offense against person or property, or after such attempt shall have failed, shall be deemed murder in the second degree." Laws 1891, p. 150.

Comparing the testimony with this statute, is it clearly apparent that the homicide was not "perpetrated without a design to effect death, by a person while engaged in the commission of a misdemeanor," because it is not shown or claimed that there was any attempt to commit a misdemeanor on the part of either the deceased or the defendant, but it was simply a dispute between defendant and the deceased about some sheep. Nor is there anything to show that the homicide was "perpetrated in the heat of passion without design to effect death, but in a cruel and unusual manner, because there is no testimony that any "heat of passion" on the part of either the defendant or the deceased, for it is plain according to defendant's own testimony, that it was perpetrated while they were engaged in a struggle over the possession of the gun. Nor was the death effected in a "cruel and unusual manner," but by a gunshot, in the latest and most approved manner and style of taking human life under such circumstances. Territory v. Pridemore, 4 N. M. 275. The death was effected "by means of a dangerous weapon," but if defendant's testimony is to be taken as true, it was committed under such circumstances as to constitute "excusable homicide" * * *

because defendant says, in the struggle for the gun it went off, shot and killed the deceased, and that "I didn't do it intentionally." Nor is there anything to show that the killing was "perpetrated unnecessarily" "while resisting an attempt" by the deceased to "commit any offense against the person or property" of the defendant, or after any such attempt had failed; because there was no such attempt made on the part of the deceased.

The death of the deceased was effected by the defendant, and he did it either with a "design to effect death" or he did it by accident, and if he did it with a design to effect death, without any just provocation, then it was murder in the first degree, according to the testimony before the jury, and if, as he says, he "didn't do it intentionally," then it was excusable homicide; and as to which of these two propositions was correct it was within the province of the jury to determine. And it would have been error on the part of the court to have instructed in the second degree, because there was no evidence tending to establish that grade of the crime charged. Territory v. Fewel, 5 N. M. 34; State v. Alexander, 66 Mo. 148.

Murder in the third degree is defined by our statute to be: "Sec. 6. Every killing of a human being by act, procurement, or culpable negligence of another, which, under the provisions of this act, is not murder in the first or second degees, and which is not excusable or justifiable homicide as now defined by law, shall be deemed murder in the third degree." Laws 1891, p. 150.

The testimony shows that the killing took place at the Valle de San Isedoro, some fifteen miles distant from any settlement, and in the nighttime, and the defendant had a right to have his gun with him at that time and place. There is nothing whatever in the testimony in the record to show that the homicide

occurred from any unlawful act or intent on the part of the defendant; nor is there anything to show that the killing was brought about by the "procurement or culpable negligence" of the defendant. He says, in effect, "that he was sitting upon a water keg with his gun by his side, some feet from the deceased, and that the deceased rushed upon him and seized hold of the gun, and in the struggle for the possession of the gun it went off, and the deceased was shot, and instantly killed," and that "he didn't do it intentionally." Defendant did nothing in respect to the "procurement" of the death of the deceased; nor is there anything to show any act of "culpable negligence" on the part of the defendant. He had a right to be at the place of the homicide and to have his gun with him there. According to his testimony he was not using the gun in any unlawful or threatening manner whatsoever. Negligence is usually defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Blyth v. Birmingham Waterworks, 11 Exch. 784; 2 Bowd. Law Dic.; Thompson on Trials, sec. 1662.

It is plainly to be seen that there was no evidence in the case warranting an instruction of murder in the third degree. Territory v. Fewel, supra; Territory v. Pridemore, 4 N. M. 275.

On the question of excusable homicide the court charged the jury as follows:

"If you believe from the evidence that such killing was the result of accident, or misfortune during the struggle between the defendant and the deceased, in which the deceased was seeking to disarm defendant, and said rifle was accidentally discharged, or if such evidence creates in your mind a reasonable doubt

MURDER: evidence: degrees: instruction.

as to whether the defendant unlawfully, deliberately, and of his premeditated malice killed the deceased, or if from any other reason you are not satisfied beyond a reasonable doubt of defendant's guilt, you should find the defendant not guilty, but if all the evidence in the case leaves in your minds, after careful consideration of the same, an abiding conviction of defendant's guilt, then you should so find him."

* * * * * * * *

"Your verdict in this case will either be that the defendant is guilty of murder in the first degree, or that he is not guilty, you being instructed that you are confined to one of these two forms of verdict."

Counsel for appellant contend that error intervened to the prejudice of appellant by reason of the last instruction quoted, because the court said, "You are instructed that you are confined to one of these two forms of verdict." There was no error in giving this instruction to the jury. Judge BRINKER, in Fewel's case, supra, after quoting approvingly from Alexander's case, supra, in which Judge HENRY said, "He was either guilty of murder in one of the degrees in which an intent to kill is an element, or the killing was justifiable," said, "And the attention of the jury should have been confined to that issue." In Young's case, supra, the same instruction complained of here was given and was assigned as error, and Chief Justice PRINCE, in an able opinion, said, in passing on this alleged error: "The statement of the court below that 'the verdict should be guilty of murder in the first degree, or not guilty,' was exactly equivalent to the other statement. There is no evidence before you tending to show that the killing is murder in any other degree than the first." * * * And it was held not to be error. It is plain, therefore, that this court has held in effect, if not in direct words, that it is the duty of the trial court to confine the attention

of the jury to the issues involved by the evidence, and the court, at its peril, must instruct on all the law applicable to all the evidence, and then confine the jury to those issues alone. Territory v. Friday, 8 N. M. 204.

These instructions submitted all the evidence in the case fairly to the jury; and it was either murder in the first degree, or it was excusable homicide, and as to which it was, was the province of the jury to determine. And they found that it was murder in the first degree.

There are many other errors assigned but it is deemed unnecessary to consider them. The record shows that the defendant had a fair and impartial trial, and there is no reversible error in the record of this case, and for the foregoing reasons the judgment of the court below is affirmed. And it is so ordered.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

[No. 630. September 1, 1896.]

TERRITORY OF NEW MEXICO, APPELLEE, v. MANUEL GREGORIO VIGIL, APPELLANT.

CRIMINAL LAW—INDICTMENT—ASSAULT WITH INTENT TO MURDER—INSTRUCTION.—On a trial on indictment charging an assault with intent to murder, an instruction to the jury that all that was necessary for the prosecution to prove, to warrant a verdict of guilty, was sufficient to satisfy them beyond a reasonable doubt that defendant did, at the time and place mentioned, make an assault upon the person of the prosecuting witness with the intent to inflict upon him bodily injury, was misleading and erroneous.

APPEAL, from a judgment of the First Judicial District Court, Taos County, convicting defendant of assault with intent to kill. Reversed and remanded.

The facts are stated in the opinion of the court.

CATRON & SPIESS for appellant.

The instructions of the court are erroneous. They direct the jury to conclude that an assault to kill was committed, when the assault itself only amounted to bodily injury, and to conclude an intent to kill from the mere fact that an assault had been committed. Law. Presumptive Ev. 271; Maher v. People, 10 Mich. 212; Roberts v. People, 19 Id. 401; State v. Stewart, 29 Mo. 419; Jeff v. State, 37 Miss. 321; Simpson v. State, 59 Ala. 10; Morgan v. State, 33 Id. 413; Washington v. State, 53 Id. 29; Patterson v. State, 85 Ga. 131; State v. Meadows, 18 W. Va. 658.

The court went further, and directed the jury to find defendant guilty of an intent to murder, from the mere fact that the shooting did bodily harm, whether the intent was proven to exist or not. This was error. State v. Jefferson, 3 Harr. (Del.) 571; Davidson v. State, 9 Humph. 455; Danes v. State, 2 Id. 439; Cole v. State, 5 Eng. 318; Rex v. Hunt, 1 Moody, 93; Reg. v. Stringer, 2 Id. 261; Reg. v. Nichols, 9 Car. and P. 267; Rex v. Davis, 1 Id. 306; Rex v. Mogg, 4 Id. 364; Reg. v. Sullivan, Car. and M. 209.

JOHN P. VICTORY, solicitor general, for the territory.

Even though there were errors in the charge, a verdict of guilty of an assault with intent to murder, or of a lesser crime involved therein, will not be set aside, where the evidence fully sustains the verdict. Sumby v. State, 7 S. E. Rep. 737.

The court properly refused to grant the instructions offered by defendant to the effect that the jury, in case they failed to believe the defendant guilty of an intent to murder, should find him not guilty. Even if the jury failed to find present the intent to murder, they were still at liberty to find the defendant guilty of an assault with a deadly weapon. Jones v.

State, 11 S. Rep. (Ala.) 399; Horn v. State, 13 Id. (Ala.) 329.

HAMILTON, J.—The defendant, Manuel Gregorio Vigil, was indicted in the district court of Taos county, at the May term, 1893, for an assault with intent to kill one Manuel Leyba. The defendant was tried and convicted under said indictment at the November term of said court, 1894, and was sentenced to two years in the penitentiary. Motions for new trial and arrest of judgment being overruled, he brings this case here by appeal.

Counsel for appellant in the court below makes an attack first upon the indictment, but at the argument of the cause he has virtually abandoned this position. The indictment is framed under the first clause of section 713 of the Compiled Laws of New Mexico, and is an indictment for an assault with intent to murder. It being an indictment for an assault with intent to murder, framed under the first clause of this section 713, it was not necessary to allege in the indictment that it was the intent to kill and murder in any of the ways mentioned in section 712, for the indictment is not an indictment for an assault with intent to maim or disfigure, etc., as mentioned in section 712, but is simply an indictment for an assault with intent to murder. We think the indictment sufficiently charges the unlawful intent to kill and murder to make it good in that respect.

The main ground of error set forth in the brief and insisted upon in the argument is based upon the action of the court below in giving and refusing instructions. It is insisted by the appellant that the court erred in giving the third, fourth, seventh, and eighth instructions. The third instruction given by the court is as follows: "(3) The court further instructs the jury that all that is necessary for the territory to prove in this

INDICTMENT: assault with intent to kill: instruction.

case, to warrant a verdict of guilt, is enough to satisfy the jury from the evidence, beyond a reasonable doubt, that the defendant did, on the twenty-fifth day of November, 1892, or at some time within three years prior to the sixteenth day of May, 1893, within the county of Taos and territory of New Mexico, make an assault upon the person of the said Manuel Leyba with a revolver or pistol, loaded with gunpowder and leaden bullets; that the same was then and there a deadly weapon; and that such assault was made with intent to inflict upon the person of the said Manuel Leyba a bodily injury, when no considerable provocation appeared, or when the circumstances of the assault showed an abandoned and malignant heart of the defendant at the time." The serious ground of complaint urged against this instruction by the appellant is that it directs the jury that they should find the defendant guilty of an assault with intent to commit murder if they found the assault was committed with an intent simply to do bodily injury. The defendant is charged with an assault with intent to murder. In order to convict the defendant of the crime charged in the indictment, it is necessary for the territory to establish two facts, viz., the assault and the intent; and, before the jury can find the defendant guilty, they must find that the defendant committed the assault, and that he did so with the intent to murder, as charged in the indictment. "It is the intent unlawfully and maliciously to kill the person assaulted which constitutes the crime of assault with intent to murder." Washington v. State, 53 Ala. 29; Morgan v. State, 33 Ala. 413. "In a prosecution for an assault with intent to murder, the actual intention to kill must be found." Maher v. People, 10 Mich. 212; Roberts v. People, 19 Mich. 401; Jeff v. State, 37 Miss. 321; Simpson v. State, 59 Ala. 10; State v. Stewart, 29 Mo. 419. In the indictment the defendant is charged with an assault with intent

to murder. This instruction would authorize the jury to find the defendant guilty if they found from the evidence, beyond a reasonable doubt, that he made the assault with intent to inflict upon the person of Manuel Leyba a bodily injury. An assault with intent to murder is an entirely different charge from an assault with intent to maim or disfigure or commit bodily injury. It will not do to say that a man under indictment charged with an assault with intent to murder could be convicted of that offense by the jury if they found that he was simply guilty of an assault with intent to commit bodily injury. In the case of State v. Meadows, W. Va. 658, an instruction of this kind was given: "If they believe the shooting was done with intent to maim, disfigure, disable, or kill him, or to cause him bodily injury, they must find the defendant guilty." This instruction was held bad by the court for the reason that it authorized the jury to find the defendant guilty of an assault with intent to murder from the mere fact that they found that he had been guilty of an attempt to do bodily injury. In the case of Kilkelly v. State, 43 Wis. 604, the defendant was charged in an information with an assault with intent to murder, and the court held that a charge with intent to murder will not warrant a conviction of an assault with intent to maim and disfigure; the latter intent not being included in the former. The court, in passing upon that case, say: "The rule is that, where offenses are included one within another, a person indicted for a higher one may be convicted for one below, provided the averment in the indictment, in form, charges the lesser offense as well." Bish. Cr. Law, 794. And the court further say: "But we are aware of no rule of criminal procedure which sanctions a conviction for a given felonious intent on an indictment or information which does not charge such intent, but charges another intent of an entirely different character. Who ever heard of

a conviction for an assault with intent to rob on an indictment charging only an intent to murder, or of a conviction for an assault with intent to maim or disfigure on an indictment for an assault with intent to ravish? And yet the principle of the instruction under consideration would uphold such convictions. A rule which would sustain such convictions would be utterly subversive of the right guarantied by the constitution to a person accused of crime 'to demand the nature and cause of the accusation against him,' and we reject it without hesitation." The instructions complained of in this case virtually told the jury that all that is necessary for the territory to prove in this case, to warrant a verdict of guilty, is enough to satisfy them beyond a reasonable doubt that the defendant, at the time and place mentioned, did make an assault upon the person of Manuel Leyba with the intent to inflict upon the said Manuel Leyba bodily injury. This instruction, we think, was erroneous, and could not but have misled the jury, as they were authorized to find the defendant guilty of a different offense from that with which he is charged, and left out of the instruction a particular element which would constitute a proper instruction under an indictment of this character, to wit, that the jury should find that the defendant made the assault with intent to murder, and not simply with intent to do bodily injury. We do not think the other instructions complained of require our consideration, as the case must be reversed and remanded, and new trial granted, upon the error committed by the court in giving the instruction above quoted; and it is ordered.

SMITH, C. J., and COLLIER and BANTZ, JJ., concur.

[No. 584. September 1, 1896.]

FIRST NATIONAL BANK OF ALBUQUERQUE ET AL., APPELLEES, v. JOHN A. LEE, EXECUTOR, ET AL., APPELLANTS.

DECEDENT'S ESTATE—SALE OF REAL ESTATE ON PETITION OF CREDITOR TO EXCLUSION OF OTHER CREDITORS.—Where, on the petition of a creditor of the estate of a decedent, whose claim had been allowed by the probate court, for a sale of the real estate of the decedent to pay its claim, on the ground that the personal estate of the decedent was insufficient for that purpose, and the executor had refused to commence any proceeding for the sale of the real estate to pay the debts, the district court granted an order for its sale allowing the petitioner to buy the same and apply its claim in payment, to the exclusion of the other creditors, whose claims had also been allowed, it was error.

ID.—SALE OF INTEREST OF OTHERS IN REAL ESTATE, NOT SUBJECT TO DECEDENT'S DEBTS—PROCEDURE UNDER STATUTES.—Though sections 2228, et seq., Compiled Laws, providing for the sale of decedent's real estate for payment of debts, does not authorize the sale of the interest of any one else therein, not derived through decedent or liable for his debts, a proceeding thereunder for such sale may be joined with one under sections 2274, et seq., providing that, if the lands are not susceptible of division, so that an interest of the widow, not liable for the husband's debts, can be set apart, a sale of the whole may be made. But before such sale, the interest of the widow should be ascertained, that her rights may be protected at the sale.

APPEAL, from a decree for complainant for a sale of decedent's real estate, from the Second Judicial District Court, Bernalillo County. Reversed (with leave to complainant to amend).

The facts are stated in the opinion of the court.

F. W. CLANCY and NEILL B. FIELD for appellants.

WARREN, FERGUSSON & GILLETT for appellees.

HAMILTON, J.—This is an appeal from the Second judicial district, Bernalillo county. The facts as they

appear in the record, so far as it is necessary to state them here, show that William E. Talbott died in Bernalillo county, in 1888, and John A. Lee was appointed his executor. He left surviving him his widow and three children. At the time of his death he was possessed of personal property to the amount, as disclosed in the record, of something like $6,000, and also a large amount of real estate.

During the course of the administration of his estate there was presented and allowed against it by the probate court of Bernalillo county debts to the amount of something like $4,000.

The executor sold the personal property and realized therefrom something like $6,000.

The complainant in this case being a creditor of the estate of the deceased William E. Talbott, and having had its claim allowed against the estate in the sum of $5,500, and there not being sufficient funds arising from the sale of the personal estate of the deceased to pay the complainant its claim, with that of other creditors, the complainants on the third day of November, 1890, presented and filed in the district court in Bernalillo county a petition asking for an order to sell the real estate of the said deceased William E. Talbott to pay its claim.

The petition set out the indebtedness due to the complainant; that the personal property was insufficient to pay its debts; that John A. Lee, executor, after being requested by complainant to do so, had declined and refused to commence and carry on any proceedings in the premises for sale of the real estate to pay the debts. The prayer of this petition, among other things, recites, as follows:

"Wherefore your petitioner prays that the said real estate hereinbefore mentioned, or such portion thereof as may be necessary, be sold or leased by the

said John A. Lee, executor as aforesaid, or that the said executor raise money for the discharge of said debts to your petitioners by mortgage of all or any part of said real estate, and for such other and further relief as may be equitable and proper in the premises."

Answers were filed by the defendants, executor John A. Lee, and by the widow of the deceased, and also by the guardian ad litem for the minor heirs of the deceased.

This cause was referred to a master who found that the value of the personal property was $6,848.54, and that the executor had sold this property and reduced it to cash. He also found that the aggregate amount of claims allowed by the probate court against the estate was admitted by the pleadings to be $40,426.56, while the proof showed only $17,982.28, and that the personal property was insufficient to pay the debts.

Exceptions were filed to the master's report, upon which, upon a final hearing, the court entered a decree, in which the court found, among other things, as follows:

"And the court further finds that the value of the personal estate of said William E. Talbott, deceased, was of the amount and value of six thousand, eight hundred and forty-eight dollars and fifty-four cents ($6,848.54) and that the same had been sold and the proceeds applied by said executor; that the said executor has not made any report of the amount received from such sale of the claims allowed against the said estate which have been paid; and that the aggregate amount of claims allowed by the probate court of said county against the said estate is in excess of seventeen thousand, nine hundred and eighty-two dollars and twenty-eight cents ($17,982.28), and that none of the same have been paid by said executor, and that the

personal estate of said deceased is and will be wholly insufficient to discharge the just claims and debts in favor of said petitioners and others allowed against the estate and expenses of administration and legacies charged thereon and that the amount of such deficiency will be about the sum of $20,000."

And after further providing for the appointment of a special master to conduct said sale, and the manner in which it should be made, the court then ordered, as follows:

" * * * and that upon the confirmation of the said sale and conveyance, such purchaser or purchasers shall, upon presentation of such deed, be let into immediate possession of said property and premises, and that upon said sale the said petitioners or either of them shall be and are hereby allowed to bid and become purchasers and to apply the amount of their said claims against said estate towards payment of the purchase money: And it is hereby further ordered, adjudged and decreed, that out of the proceeds of the said sale, the said special master in chancery shall first pay the costs and expenses of this proceeding and of said sale, including the sum of one hundred and fifty dollars, which is hereby allowed as compensation of said special master, Owen, and one hundred and twenty-five dollars compensation to W. B. Childers, Esq., as guardian ad litem of the infant defendants and all taxes and assessments which are and may be payable and constitute a charge or lien upon said property, and thereafter bring into court the remainder of the purchase money to be held and applied in accordance with the findings of the court herein, * * * ."

From this decree an appeal has brought the case to this court.

Various grounds for the reversal of the judgment have been assigned as error, but as the case must be reversed and remanded to the district court we deem it

DECEDENT'S ESTATE: sale of real estate on petition of creditor to exclusion of other creditors.

unneccessary to consider but one point raised in the case. The complainants seem to have proceeded upon the idea that they, being a creditor of the deceased Talbott, and having had their claim allowed against the estate, and there not being sufficient personal property out of which to pay them with other creditors, had a right to file this petition for a sale of the real estate, for their personal benefit, and that they had a right to have the proceeds arising from the sale of this real estate applied to the payment and satisfaction of their debt to the exclusion of other creditors, who had also had claims allowed in the probate court against the estate of Talbott.

The court in the rendition of its decree seems also to have carried out the idea of the petitioners, for the court provided in the decree that:

"Upon said sale, the said petitioners or either of them shall be, and are, hereby allowed to bid and become purchasers and to apply the amount of their said claims against said estate towards payment of the purchase money."

By this provision of the decree the complainants in this case had a right to bid upon the property and pay that bid in the amount of the claim which the estate owed them. This clearly gave the petitioners a right to a lien upon the proceeds of the sale of the real estate, prior and superior to that of any other creditor of the estate of Talbott. This in our opinion was error.

This proceeding to subject the real estate of the deceased to the payment of the debts allowed against the estate is statutory. But the statute provides in section 2236 that the form of the proceeding shall conform to the proceedings of courts of chancery, and the issues shall be formed, heard and determined as proceedings in chancery.

The statute provides (section 2228), that whenever it shall appear that the personal estate of any decedent is insufficient to pay up the debts allowed against the estate, resort may be had to the real estate, and the same may be sold, mortgaged or leased by the executor or administrator, if authorized by the will or by order of the court to do so.

Section 2229 provides that the executor or administrator shall present to the district court of the county in which letters of administration were issued, his petition setting forth the amount and value of the personal estate according to the inventory and appraisement thereof, and if the sale has been made of such personal estate, the amount received from such sale, the amount of debts and claims allowed against the estate and the amount still existing and not allowed, so far as the same may be known, also describing the real estate of which the decedent was seized, or that in which he had an interest, and the nature and value of real estate, and the incumbrances, if any.

Section 2239 provides that upon the hearing of the cause it is to be the duty of the court to hear proofs touching the matters alleged in the petition, and if upon such hearing it shall appear that the personal estate would be insufficient to discharge the just debts and claims allowed against the estate, and the expenses of the administrator, the court shall determine, as near as may be, the amount of such deficiency, and may thereupon direct that the real estate, or such portion as may be necessary, be sold or leased by the executor or administrator, or that the executor or administrator raise money for the discharge of such debts, legacies, by mortgage, of all or any part of such real estate, or that any part of such real estate may be sold according as may be seen most for the interest of all persons interested in the estate, due regard being had to the rights of all.

If the court should determine that a sale of the real estate should be made instead of a lease or mortgage thereof, then section 2244 provides that the sale shall be made at such place and upon such notice as the court may direct, not less than twenty days, and the sale shall be at public auction, unless in the opinion of the court it would benefit the estate of the deceased to sell the whole or any part of such real estate at private sale, in which case the court, if asked for in the petition, may order such real estate, or any part thereof, to be thus sold by the executor or administrator, "but such order of sale shall not be granted until such executor or administrator shall have made and returned into court an inventory of such real estate and caused the same to be appraised, in the manner as near as practicable, now prescribed for the appraisement of real estate levied upon by execution, and such appraisement returned into court."

Section 2249 provides that the moneys arising from any such sale of the real estate "shall be assessed in the hands of the executor or administrator for the payment of the debts and legacies; and shall be administrated under the direction of the probate court in the same manner as moneys arising from the sale of personal property."

It is clear from these sections of the statute above quoted that the real estate of the deceased may be subjected to the payment of the debts allowed against the estate.

The proceeding to sell real estate of decedents under the statute does not require the ascertainment of who are creditors of the estate and what may be the amount of each claim, but it is sufficient to show that the sale of the real estate is necessary to pay debts. Of course, when the proceeding is not instituted by the representative of the estate, but by a creditor, his standing as such must be averred and shown in order

to qualify him to institute the proceeding, but when the real estate of the decedent is sold under the decree the proceeds are to be paid over to the executor or administrator for administration under the directions of the probate court. The statute in terms so requires. His failure or even refusal to institute the proceedings thereby rendering it within the power of a creditor to institute them, does not operate to remove the executor or administrator from office, or revoke his letters. If the administrator has so conducted himself as to justify his removal, proceedings for that purpose must be regularly instituted, but until so removed he is entitled to administer the estate.

The allowance of an ordinary claim against the estate of a deceased does not give the creditor any superior right or lien over the real estate or the proceeds arising from the sale thereof, prior and superior to the rights of any other creditors whose claim against the estate may be allowed.

By filing this bill the bank did not acquire any prior right to payment of its claim. The fund when realized must be administered under the order of the probate court in conformity to law, and without any priority to complainant over other creditors. So much is clear.

If this proceeding be purely statutory under section 2228, et seq., the real estate which may be sold is the real estate of the deceased. There is no authority under these sections to coerce the sale of the interest of anyone else. The statute provides, it is true, for making the widow, the heirs and devisees, parties defendant, but this is only because of their interests in the property by and through the deceased. If the widow has any interest in the real estate otherwise than by descent, and which is not liable for her husband's debts, it is not an interest which can be divested by coercive

SALE of interest of others in real estate not subject to decedent's debts.

sale under the statute. If the lands are not susceptible of division so that her interest can be set apart a sale of the whole may be made under the statute. Section 2274, et seq. And we do not see why these two proceedings can not be joined in one suit. But before making such sale the interest of the widow should be ascertained so that her rights at the sale can be protected without putting her under the burden of protecting incidently the rights of the creditors. Her interest is not the same as against creditors whose debts were incurred during the life of the act of 1887, chapter 32, and other creditors before and since then. The amount of debts incurred during the life of the act of 1887 must, therefore, be ascertained, and the interest of the widow be ascertained, after considering such debts and also those of other creditors. If there is no difference as to her rights in respect to creditors, and it is only such interests as may remain after paying her husband's debts, the necessity of ascertaining her interests before sale may be unnecessary.

The bill will require material amendments, but enough has been shown to indicate the proper course to be pursued in this case.

The cause must be reversed with leave to complainant to amend the bill and for further proceedings in conformity with this opinion after so doing.

SMITH, C. J., LAUGHLIN, BANTZ, and COLLIER, JJ., concur.

[No. 650. September 1, 1896.]

IN RE JOSE F. JARAMILLO. HABEAS CORPUS.

CONTEMPT—FAILURE OF ADMINISTRATOR TO OBEY DECREE OF COURT—ATTACHMENT.—An attachment for contempt will not be issued against an administrator for failure to obey a decree of court ordering him to pay a sum of money found to be due his co-administrator on a settlement of the estate, where it appears that the defendant administrator has no such sum in his possession, and is unable to obtain the same.

ID.—IMPRISONMENT FOR DEBT—REPEAL OF STATUTE.—Held: That so much of Compiled Laws 1884, section 2158, as provides for execution against the body of defendant, was repealed by section 2183, Id., forbidding execution against the body of the execution debtor, except in cases of fraud and personal injuries with the proviso therein contained.

ID.—FINDING—EVIDENCE.—In such proceeding, a decree finding that a certain sum of money was in the hands of the defendant administrator, and ordering a portion thereof, found to be due defendant's co-administratrix, to be paid to her, was not sufficient to show that defendant had such sum in his possession or under his control, so as to make him guilty of contempt in not paying it over, where defendant denied under oath that he had the money or had been able to obtain it.

PETITION for writ of habeas corpus. Granted, and petitioner discharged.

CHILDERS & DOBSON for petitioner.

A court in this territory can not enforce a decree simply for the payment of money by process of attachment for contempt and imprisonment. Noonan v. Lee, 2 Black. 499; Orchard v. Hughes, 1 Wall. 73. These decisions were rendered on the provision of rule 92 with reference to foreclosure cases, which is expressly applicable to territorial courts. Equity Rule 92, U. S. Cir. and Disct. Ct.; Comp. Laws, sec. 522; Id., secs. 2157, 2158; 2 Danl. Chy. Prac., pp. 1030,

1042, secs. 6, 7; Battle v. Bering, 7 Yerg. (Tenn.) 529; 3 Danl. Chy. Prac. 2377, Rule 8; Rev. Stat. U. S., sec. 990; Mallory v. Fox, 20 Fed. Rep. 409; 2 Barb. Chy. Prac. 271, and notes; In re Hess, 1 N. Y. Sup. 611. See, also, Coughlin v. Ehlert, 39 Mo. 285; Seagear v. Seagear, 36 N. W. Rep. 536; Leech v. Peabody, 2 Atl. Rep. 745; Dig. N. Y. Chy. Rep., p. 32, sec. 27; 10 Am. and Eng. Ency. Law, 214, note; Id., 217, 218; Mfg. Co. v. Fox, 20 Fed. Rep. 409; Ex parte Hardy, 68 Ala. 303; Board of Education v. Scoville, 13 Kan. 17; Robert v. Stoner, 18 Mo. 482; Wightman v. Wightman, 45 Ill. 167; Steller v. Steller, 25 Mich. 159; Holmes v. State, 2 Green (Iowa), 120.

Nor can it be contended that the decree comes within the exception (fraud) of the statute. Carr v. State, 17 S. Rep. 350. The language of section 2183, Compiled Laws 1884, "except in cases of fraud" relates to fraud in contracting the debt, not to failure to comply with the statute. State v. Norman, 14 S. Rep. 968, 969; Smith v. Smith, 92 N. C. 304; Galland v. Galland, 44 Cal. 475; Ex parte Grace, 12 Iowa, 209; 7 Am. Dec. 529, and note.

The answer of respondent, that he did not have and never did have the money, was full and complete, and on it he should have been discharged. McCarrell v. Mullins, 21 Atl. Rep. 778. See, also, State v. Galloway, 98 Am. Dec. 404; Williamson's case, 67 Id. 380, and note; Comm. v. Leckey, 36 Id. 41, 42, note; Caton v. State, 87 Id. 49; Shattuck v. State, 24 Am. Rep. 624.

NEILL B. FIELD for respondent.

To deny to a court of chancery in this territory the power to enforce such a decree is to deny to it the right to exist and administer justice. 2 Danl. Chy. Prac., p. 1032.

There is nothing in the English statutes or in the

statutes of the territory, which attempt to modify or take away the power of the court to enforce its decrees by process of contempt. 2 Danl. Chy. Prac., p. 1042.

Where an executor or other fiduciary admits the receipt of trust funds such admission is conclusive against him when ordered to pay such funds into court, or make other disposition of them. Roy v. Gibbon, 4 Hare, 65; Richardson v. Bank of England, 4 Milne & C. 177; Haggerty v. Duane, 1 Page, 312; 7 Am. and Eng. Ency. Law, 406.

Section 2183, Compiled Laws 1884, by its express language is applicable to the cases of execution debtors, and this is a common law expression having a well defined meaning, and no other meaning should be given to it. An attachment for contempt, issuing out of a court of chancery, is in no sense such an "execution," and the above statute in no manner interferes with the power of a court of chancery to enforce the payment of money by an executor. Chew's Appeal, 44 Pa. St. 250; Tome's Appeal, 50 Id. at 285.

It has been repeatedly held by courts of high authority that imprisonment for contempt in failing to pay money, as directed by a decree in chancery, is not in violation of the constitutional provision forbidding imprisonment for debt. Ex parte Grace, 12 Iowa, 212; State ex rel. v. Becht, 23 Minn. 411; Musser v. Stewart, 21 Ohio St. 353.

If it be true that imprisonment for debt is abolished in this territory by section 2183, it is not abolished in cases of fraud, which are expressly excepted from its provisions. Ex parte Clark, 20 N. J. Law, 648. If the abolishment be conceded, it is at best but provisional, not absolute. Comp. Laws 1884, sec. 2183, Proviso.

LAUGHLIN, J.—The petitioner, Jose F. Jaramillo, with Trinidad R. de Jaramillo and Celina C. Jaramillo,

were co-administrators of the estate of Telesfor Jaramillo, deceased, and resided in Valencia county, New Mexico; and in respect to the settlement of said estate in the probate court for said Valencia county, there was a suit and a judgment which was appealed from to the district court for the Second judicial district for said county; and on a hearing of the case in said district court, certain findings were made by said court, among which findings one was as follows, to wit: "Eighth. The court doth further find that the fee of $1,500 paid by Celina C. Jaramillo to Neill B. Field should be a charge against said estate, and paid out of the assets thereof; and that it is the duty of the said administrator forthwith to reimburse the said Celina C. Jaramillo, the said sum of $1,500, out of the money found by this decree to be in their hands."

The petitioner failed to obey the decree and order to pay over the said $1,500, and thereupon an affidavit was filed and an attachment was issued against the petitioner Jose F. Jaramillo as for contempt of court committed by his failure to pay the said sum of money as required by the terms of the decree of said district court; and thereupon the petitioner was arrested and brought before the said court; and the petitioner and his co-administratrix, Trinidad R. de Jaramillo, filed their answer under oath, in which answer among other things they said: "Further answering these respondents allege that they have not had, nor have they been able to obtain sufficient money to pay the amount of money required to be paid by them by the terms of the said decree, since the rendition thereof and up to this date."

On the hearing the court held that the answer was insufficient, and thereupon issued a commitment committing the petitioner into the custody of the sheriff of Valencia county, until he as such administrator shall fully comply with the terms of the said decree of said

court. Thereupon the petitioner filed his petition in this court for a writ of HABEAS CORPUS, in which petition he alleged that he was advised by counsel and believed that the court by whom said commitment was issued had no jurisdiction to issue said commitment for the purpose of enforcing the said decree of the said court. And that said court can not enforce the performance of the said decree by process of attachment as for contempt.

In the answer filed by this petitioner and his co-administratrix, it is alleged that "they did not have the sum of money, represented by said items of personal property, for which they were held accountable, in their possession at the time of the rendition of said decree or any part thereof;" that the note (one of the items for $1,586.80) was a personal obligation of the petitioner to his brother, the said deceased, in his lifetime, which he was, at the time of the rendition of the decree and has ever since been, unable to pay; the other items were for money and live stock, and allege that they did not have the money in their possession nor were they able to obtain the money with which to pay the amount adjudged by the court in said decree to be by them paid."

CONTEMPT: failure of administrator to obey order of court: attachment.

It is contended by counsel for Celina C. Jaramillo, that the finding of the court that "the said sum of $1,500 out of the money found by this decree to be in their hands" is conclusive as against this petitioner that he and his co-administratrix then had the money in their possession, and that the petitioner can not be heard to traverse it by their answer; and that there being funds in the hands of the administrators, the court had jurisdiction to enforce obedience to its decree by attachment as for contempt on their failure to comply with the terms of the decree in paying over the money.

The decree of the court can be construed in this case only as a finding by the court that the petitioner and his co-administratrix owed the amount of money found due to their other co-administratrix, the said Celina C. Jaramillo, as it nowhere appears in the papers in the case that this petitioner and his co-administratrix, the said Trinidad R. de Jaramillo, admitted that they actually had the money on hand or in their possession at the time the decree was enrolled, or at the time the attachment and commitment were issued, but on the contrary, they state in their sworn answer that they did not have the money and were, and had been, ever since the enrollment of the said decree unable to obtain the money with which to pay and comply with the terms thereof, and such being the facts in this case, it therefore appears that this is an effort to enforce the payment of the sum of money named by the process of attachment as for contempt.

Counsel for said Celina C. Jaramillo has cited many cases in support of his contention that this is not a proceeding to collect a debt by process of attachment as for contempt, but is a process to compel obedience to an order of a court of chancery; but we are constrained to believe after a careful consideration of the cases cited that they do not apply to the case at bar.

In the case of Gilmore v. Gilmore, 40 Me. 50, the facts stated are that, "the charge in the original bill was, that Martin Gilmore, one of the defendants and copartners with plaintiff, having possession of certain notes described against one Pendleton, the property of the firm, transferred and delivered them to Patterson, another defendant, for the purpose of deriving benefit therefrom, personally; and with the design of defrauding plaintiff and creditors of the firm, and that Patterson had knowledge of these facts and thereby became a participator" in the alleged fraud. "Pendleton, in his answer, admitted that he gave the notes and was

ready to pay the same according to their tenor, to any party entitled to receive the same, and prayed the direction of the court."

A receiver was then appointed to obtain the notes and collect the sums due, and he "made return of his doings, that he had called on Patterson and received the notes in controversy; that he had called on Pendleton to pay them, but he declined unless an allowance was made, "as to certain payments not credited on the notes, and he also declined to pay certain interest."

In the opinion the court says: "That defendant, Pendleton, refuses to pay to the receiver the amount of his notes, according to the decree of the court, unless a very considerable portion of the principal and interest, apparently due thereon, shall be abated, and the receiver asks the direction of the court."

"In his answer Pendleton professed his readiness, at all times, to pay over the amount of his notes, when he should do so with safety to himself. No claim for abatement from the sum apparently due was then set up by him. Nor was there any suggestion in his answer that any portion of said notes had been paid, or that the whole amount thereof was not justly due from him." "Under these circumstances, this refusal to pay his note to the receiver has the appearance of a disposition to palter with the authority of the court, if not to practice a fraud upon those who are interested in the proceeds of the property in his hands. Such a course can not be approbated nor permitted." And the attachment was issued.

It will be seen that the facts in that case were very dissimilar to the case under consideration. Counsel for Celina C. Jaramillo cites Chew's Appeal, 44 Pa. St. 247, which is almost directly in point of fact, to the case under consideration, and is founded upon most substantial reasons and logic, but it is based upon a statute which appears to me to be very different from

our own statute on this subject. The legislature in that state in 1842, abolished imprisonment for debt, but it expressly excepted, "proceedings as for contempt to enforce civil remedies." And the court held that the process as for contempt in disobedience of the order of the court of common pleas to pay over the distributive portion or sum so ordered was properly issued on the ground that the process was to enforce a civil remedy.

This case was cited with approval in Tome's Appeal, 50 Pa. St. 285, and after referring to Chew's case, supra, the court says: "But here the order is founded upon an abuse of trust, and a fundamental conversion of its funds, for an executor who refuses either to give security or pay over after he is dismissed, stands in the altitude of a speculator of the fund."

The facts were that Tome, the executor, had come into the possession of the effects of the testatrix's estate by virtue of that trust, and had failed to give the security required of him by the orphan's court for some breach of his trust, and an order was made on him by the court of common pleas "to pay and deliver over to his successor all the goods, chattels, effects and estates of the testatrix in his hands." Which distinguishes it very materially from the case at bar. And the court further said: "But his duty required him to hand over at once everything to his successor, or to obtain such qualifications of the order as the court might deem necessary. Upon doing neither, he was clearly in contempt, and it became necessary for the court to enforce obedience to its order; not merely by way of punishment for his contempt, but as a means of reaching the purpose of the decree, and rescuing the effects of the estate held by him without security." A court of chancery most assuredly has the authority in this jurisdiction to enforce an order in the nature of that last referred to.

The case of Ex parte Grace, 12 Iowa, 208, was where a judgment had been obtained, execution issued and returned unsatisfied; the county judge then ordered the debtor before him under the authority of the statute, examined him and found that he had money in his possession and ordered him to turn it over to be applied on the judgment, and on his refusal so to do ordered him committed for contempt until he should comply with the order; whereupon he petitioned for a writ of HABEAS CORPUS and was, on hearing before Judge DILLON, discharged; the public prosecutor and jailor appealed, the supreme court held that, "if the county judge has jurisdiction to try such issues, then what power may he not exercise? Having no jurisdiction, he had no power to make the order, and though the disobedience of it was styled a contempt, it was not such in legal contemplation. For there could be no legal disobedience where there was no power to make the order continued." And the discharge of the petitioner was sustained.

Our statutes on this subject are as follows: Sec. 2157 (C. L. 1884). "The party in whose favor and judgment, order or decree in any court may be returned, shall have execution therefor in conformity to the order, judgment, or decree."

IMPRISONMENT for debt: repeal of statute.

Sec. 2158 (Id.). "The execution shall be against the goods, chattels, lands and body of the defendant against whom the judgment, order or decree shall be rendered: PROVIDED, that executions from justices of the peace shall not go against lands."

These two sections were enacted in 1846, and reenacted and incorporated into the Compiled Laws of 1865. In 1857 the following section became a law, to wit: "Sec. 2183 (C. L. 1884). No execution shall be issued upon any judgment against the body of any execution debtor, except in cases of fraud and personal

injuries: PROVIDED, that the defendant, in execution, shall present under oath a schedule containing all his property, money, rights and credits."

This section was also reenacted and incorporated into the Compiled Laws of 1865. By this section it was no doubt the intention of the legislature to abolish imprisonment for debt, save as to the exceptions and proviso therein stated, and by the reenactment of all the sections above quoted into the Compiled Laws of 1865, the conflict which clearly appears was created, no doubt, simply by an oversight of the compiler; and it now becomes necessary to construe and dispose of the conflict which apparently exists, and in so doing it is required to uphold the intent of the legislature which enacted the last original law, and it is, therefore, held that the act of 1857 repeals the act of 1846, in so far as any conflict is apparent between the two acts; that is to say, that so much of section 2158 (C. L. 1884) as provides for executions "against the body of the defendant" is repealed by section 2183 (Id.), save as to the exceptions and PROVISO therein contained.

Now it is contended by counsel for Celina C. Jaramillo, that this petitioner has not brought himself within the PROVISO in section 2183, in that he has not "presented under oath a schedule, containing all of his property, money, rights, and credits."

The simple answer to this is that the papers in this cause do not show, nor is it contended, that any execution has ever been issued against the property or body of the defendant in the cause and the petitioner here. The process by attachment as for contempt is not an execution in contemplation of the statute. "And it is well known that in commitments out of chancery for nonpayment of money the prisoners have been held entitled to the benefits of the insolvent laws, in England even. Rex v. Stokes, Cowp. 136; Rex v. Peeteril, 4 Term. 809; Rex v. Davis, 1 B. & P. 336. But in

Rex v. Hubbard, 10 East, 408, it was held that one under imprisonment from an attachment for not paying the amount of an award, made a rule of court, was not entitled to the benefits of the Lord's Act, 48 Geo. 111, Ch. 123, because that act is confined in terms to persons in execution ON ANY JUDGMENT. There would be the same difficulty in giving the relator the benefit of the poor debtor's act, if this commitment were to be held valid. For this WARRANT is not an execution upon any judgment." In re Merrill Bingham, 32 Vt. 338.

The rule contended for by counsel for Celina C. Jaramillo, as stated in 2 Daniells' Ch. Prac. & Pl., sec. 1032, as to a decree for payment of money only, is not applicable now in this jurisdiction, because our statute authorizes the issuance of an execution on a decree in chancery the same as on judgment at law.

"No person shall be imprisoned for debt in any state on process issuing from any court in the United States, where by the laws of such state imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state shall be applicable to the process of the United States issued from the courts of the United States to be executed therein." U. S. Rev. Stats., sec. 990.

After the enactment of this law by congress, the supreme court of the United States promulgated rule 8, which is as follows:

"Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit courts in suits at common law in actions of ASSUMPSIT. If the decree be for the performance of any specific act as, for example, for the execution for the conveyance of land or the delivery up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant

shall be bound, without further service, to take notice, and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue an attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and payment of all costs, or upon special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of NON EST INVENTUS to compel obedience to the decree." 3 Daniell, Ch. P. and P., p. 2377.

Afterward this rule was amended by the promulgation of rule 92, of the United States supreme court rules, by adding as follows:

"That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution for the collection of the same, as provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money."

It is clearly seen from these rules that the ancient powers of a court of equity is not abrogated or abridged from the enforcement of its orders and decrees, except "when the decree is solely for the payment of money." And in that class of cases the decree is placed on the same plane with judgments at common law, that is, the enforcement of the decree for the collection of money by writ of execution.

From the examination of the whole decree it will be seen that it was a settlement of the accounts of the administrators with the estate of the deceased, and that

FINDING: evidence.

on that settlement the court found that this petitioner and his co-administratrix, owed their other co-administratrix, Celina C. Jaramillo, such sums of money as therein stated. The decree states that, "the said administrators be, and they are hereby decreed to have in their possession, belonging to said estate, the sum of $3,034.94, after having been given credit for all the items to which they are legally entitled to, and out of which said amount, it is ordered, adjudged, and decreed that the said administrators shall forthwith pay the said Celina C. Jaramillo, the sum of $1,500, in accordance with the eighth finding of fact herein" * * *.

To hold that this is sufficient to show that the administrators did actually have in their possession or under their control, and where they could lay their hands upon the actual cash, when they positively say under oath in their answer, that they did not, nor had they been able to obtain the money, would be supporting a refined technicality at the expense of the liberty of the citizen. In re Merrill Bingham, 32 Vt. 327.

In the case of Roberts v. Stoner, 18 Mo. 482, which is a case somewhat similar to this, the court held that "a writ of sequestration is a process for contempt, and by chancery courts to compel a performance of their orders and decrees. Where there is a decree against a party for the payment of money, or to do any other act, this process can not issue until he is put into contempt, or that it is shown that process can not be served." "Where an attachment is served and a party refuses to comply, he is then in contempt." It would seem that a sequestration merely to compel the payment of money, can not now issue, as imprisonment for debt is abolished. As process against the body, for the nonpayment of a debt, can not now issue, there would be no means of putting a party in contempt. These remarks are only intended for the decrees for the nonpayment

of money. When the decree is for the performance of acts within the power of the party, he may be compelled by sequestration. Such a process may have been proper, if it had been shown that Stoner had the money in his possession, and refused to give it up. This manner of enforcing decrees is now very unusual, since the statute has given the writ of execution to courts of chancery to carry into effect their decrees." * * *

The case of Coughlin v. Ehlert, 39 Mo. 285, was where the petitioner for HABEAS CORPUS, was adjudged in contempt for refusing to pay an allowance for alimony, and the court say: "The party here was under no other contempt than that of refusing to pay the money which the court had ordered to be paid as alimony. As process against the body for the nonpayment of a debt can not now be issued, there would seem to be no means of putting a party in contempt for disobeying orders or decrees for the mere payment of money."

In Steller v. Steller, 25 Mich. 159, Judge COOLEY, delivering the opinion of the court, says: "Whatever may have been the proper construction of this statute, we are clear that, with imprisonment for debt forbidden, a party can not be imprisoned for noncompliance with such an order, except on the ground for contempt of the authority of the court. There must be in the case something of wrong beyond the mere failure to pay money; and the party before he can be convicted and punished for it must have an opportunity to be heard in his own exculpation." * * * Galland v. Galland, 44 Cal. 475; Meyers v. Trimble, 3 E. D. Smith 612, where it is held that: "If it appears that the debtor is unable to pay the sum ordered to be paid, that may be deemed a sufficient excuse when he appears to answer for apparant contumacy courts will not adjudge a defendant in contempt, for not doing an impossibility, nor for not doing what it is not in his power

to do, unless he has voluntarily disabled himself to do the act, when the creation of the disability was itself a contumacious act." Hosack v. Rogers, 4 Paize Ch. 603; Van Wezel v. Van Wezel, 3 Paize Ch. 38.

If the order on the administrators had been to require them to turn over and deliver up any specific article or articles or any specific sum of money which they might have acknowledged or confessed they then had in their possession, or in bank, or in their "strong box at home" or any of the specific property in their possession then belonging to the estate of the deceased, it would have undoubtedly been proper and its disobedience could have been enforced by an attachment as for contempt, for it is not intended to be held here that a court of chancery is bereft of any of its ancient and well founded principles or powers to enforce obedience to its orders and decrees by attachment and imprisonment of the contumacious delinquent. And especially in this class of cases where the administrators hold the property in trust for the use and benefit of the CESTUI QUE TRUST, which is usually regarded as one of the most important and delicate trusts known in equity. Where the order is to deliver up stocks, securities, bonds, mortgages, or to execute deeds of conveyances, or to deliver up deeds, contracts, documents, mementos, family pictures, articles held by the family and prized as heirlooms, or for the performance of any specific act in relation to the trust, the chancellor may reach out with his long arm, and lay the strong hands of equity upon the delinquent defendant and require immediate obedience to his orders, and on failure to obey may imprison him until he does comply with the orders. But the order complained of here does not come within any of those instances here enumerated, but it is simply an order to pay over money forthwith. Which petitioner says he has not and is unable to obtain. And his inability to comply is the contempt complained of.

And it is not shown or contended that he purposely or voluntarily brought about that inability.

For the foregoing reasons the petitioner is entitled to his discharge. And an order will be made accordingly.

SMITH, C. J., HAMILTON and BANTZ, JJ., concur.

[No. 655. September 1, 1896.]

NELLIE HOLMES, PLAINTIFF IN ERROR, v. JOHN W. TYLER AND F. C. BARTLETT, PARTNERS UNDER FIRM NAME OF BARTLETT & TYLER, DEFENDANTS IN ERROR.

ASSUMPSIT—PLEADING—DEFECTIVE SIMILITER—WAIVER.—In an action of assumpsit, where defendant, after moving to dismiss for failure of plaintiff to join issue on the pleas of the general issue, went to trial on the merits, without objection to the want of a properly signed similiter, she thereby waived all objection on that account.

ID.—HUSBAND AND WIFE—LIABILITY OF WIFE FOR DEBTS OF HUSBAND—NECESSARIES—PLEADING.—In such action against the husband and wife jointly for goods sold, the refusal of an instruction requested by the wife that by the laws of this territory a married woman is not liable for the debts of her husband, and that, before the jury could find the issues against her, they must find that the goods were sold to her, and not to her husband, was error, especially where it was not alleged in the declaration that the goods sold were necessaries.

ID.—JOINT CONTRACT—VERDICT—JUDGMENT.—Where defendants were sued on a joint contract, and the verdict was against them both jointly, it was an entirety, and the judgment should have been entered against both, or a new trial granted as to both; and it was error to set aside the verdict as to one and enter judgment as to the other.

ID.—AMENDMENT AFTER VERDICT.—An amendment by dismissal after verdict is not authorized by section 1911, Compiled Laws, 1884, providing that a party may "at any time before verdict, judgment, or decree," amend upon such terms as the court may think proper.

ERROR, from a judgment for plaintiffs, to the Second Judicial District Court, Valencia County. Reversed and remanded.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiff in error.

The motion to dismiss should have been sustained. Laws 1891, p. 122.

It was error to swear the jury and proceed to the trial of the case, over defendant's objections, before the issues were made up. Miles v. Rose, 17 Fed. Cas. 288; Everhard v. Hickman, 4 Bibb. (Ky.) 341; Railroad v. Cristin, 5 W. Va. 325.

Where a verdict is jointly rendered against two or more defendants in an action upon a contract, it must be sustained as to all or set aside as to all. New trial can not be granted to part of defendants in such case, and an order granting such new trial operates to grant a new trial to all the defendants. Hill. on New Trials, 145, note a; McVean v. Scott, 46 Barb. 379; Parker v. Adams, 23 S. W. Rep. 902; Watters v. Kaufman, 3 Id. 465; Ex parte Lowman & Hanford, etc., 27 Pac. Rep. 232; Scott v. Chope, 49 N. W. Rep. 956; Porter v. Bank, 58 Id. 721.

The motion in arrest should have been sustained, for the reason that the joint verdict would not support a separate judgment against one defendant. Rush v. Rush, 19 Mo. 441.

CHILDERS & DOBSON for defendants in error.

The act of 1891, page 122, applies only to suits returnable to the first Monday of the month, occurring twenty days after service of process. This suit is to be determined under the old practice as it existed before the passage of that act.

When a trial has been had as if the similiter were filed, it will be treated as filed. Valdez v. Archuleta, 3 N. M. (Gil.) 299; Herlow v. Orman, Id. 471. See,

also, Railroad v. Jurey, 111 U. S. 585, 593; Railroad v. Shelly, 14 S. Rep. 890; Railroad v. Hanson, Id. 892; Livingston v. Anderson, 11 Id. 270.

Absence of signature of counsel to a plea in the record is not such error as will reverse the case. McCully v. Silverburg, 18 Ill. 106; Pumpelly v. Crosby, 8 Johns. 322; Hubert v. Weymouth, 2 Bl. Rep. 816.

This was a suit against husband and wife, alleging a contract made by both, just as if they had been any other two persons not husband and wife. Comp. Laws, secs. 1889, 1845.

It was not necessary to allege in the declaration that the contract was made by the consent of the husband, or to join the husband with the wife in the suit on the contract. Comp. Laws, secs. 1088, 1089; Laws 1889, chap. 90, sec. 49, repealing chap. 32, acts 1887, requiring the husband to be joined with the wife in suits brought against her for indebtedness for which she is liable under section 1088.

LAUGHLIN, J.—This was an action of assumpsit brought by the defendants in error against the plaintiff in error, Nellie Holmes and J. H. Holmes, her husband, in the district court of Socorro county, to recover about $1,100 for goods, wares, and merchandise furnished, and for rent of a certain hotel situated at Magdalena, in Socorro county. The action was begun by attachment, and was afterward removed on change of venue to Valencia county in the Second judicial district.

The declaration charges that, "For that whereas, the said defendants, on, to wit, the third day of July, 1893, at the town of Magdalena, in the county of Socorro, and territory of New Mexico, was justly indebted to the said plaintiffs in the sum of eleven hundred and forty-eight dollars and eighty-three cents, lawful money of the United States, for work and labor, care and diligence of the said plaintiffs by the said plaintiffs before

that time done, performed, and bestowed in and about the business of the said defendants and for the said defendants, and at their special instance and request," —and then follows the usual and ordinary common counts stated in a common law declaration; but there is no allegation that Nellie Holmes contracted the obligation sued on with the consent of her husband, nor is there any allegation that the supplies furnished were necessaries. The defendants filed separate pleas of the general issue. When the case was called for trial, the defendants severally moved the court to dismiss, because of the failure of the plaintiffs to join issue upon the plea of general issue. This motion was denied and defendants excepted. At the foot of the plea filed by J. H. Holmes, the words, "And the plaintiff doth the like," but this similiter was not signed by counsel for plaintiffs.

At the close of the testimony, the defendants requested certain instructions, which the court refused to give, and exceptions were duly noted. The court instructs the jury to return a verdict for the sum shown to be due as against the defendant, J. H. Holmes, and submitted the case as to both defendants to the jury, and the jury returned the following verdict, to wit:

"We, the jury, find for the plaintiffs against both defendants in the sum of $1,144.88." Thereupon defendants by their counsel filed their joint motion for a new trial, and the court sustained the motion as to defendant J. H. Holmes, and denied it as to defendant Nellie Holmes, and the plaintiffs then dismissed the case as to defendant J. H. Holmes; and after denying motions in arrest of judgment, and for a venire de novo, judgment was entered against defendant Nellie Holmes, for the sum found by the jury. To all of which defendant duly excepted.

The first assignment for reversal by plaintiff in error is, "Because the court erred in overruling the

motion of defendants to dismiss the cause for failure on the part of plaintiffs to join issue upon the pleas of the general issue." This contention on the part of plaintiff in error can not be maintained. Defendants below and plaintiffs in error here did not refuse to go to trial, but moved to dismiss the case, and the court properly denied the motion; then the trial was had as if the similiter had been filed. There was motion made to strike out the similiter for want of signature of counsel.

ASSUMPSIT: pleading: defective similiter: waiver.

"The exception is without foundation, for it has not appeared that the defendant objected to going to trial without a formal joinder of issue; as he took the chance of a verdict then, he shall not object now." 4 Pa. St. 139. In another case in Pennsylvania, decided as early as 1827, the case had been tried in the court below without issue having been joined. The error assigned was that there had been no replication filed before the trial in the court below. The supreme court in dismissing the case, says: "We will not permit an exception like this, even though there shall have been no issue at all, it would be a scandal to the administration of justice if we were longer to hear objections after a trial on the merits." 16 Serg. & R. 349.

At the time these decisions were rendered in Pennsylvania, the same system of pleading existed then as is practiced in this territory now. Valdez v. Archulet, 3 N. M. (Gil.) 296; Herlow v. Orman, Id. 471; M. & M. R. R. Co. v. Shelly, 14 S. Rep. 893; St. Johns & H. R. Co. v. Hanson, Id. 892; Livingston v. Anderson, 11 S. Rep. 270.

The ninth error assigned is that, "Because the court erred in refusing to instruct the jury, at the request of the defendant Nellie Holmes, as follows: "The court instructs the jury that, by the laws of the territory, a married woman is not responsible for the

LIABILITY of wife for debts of husband: necessaries: pleading.

debts of her husband, and before they can find the issues against the defendant Nellie Holmes, they must find that she was the sole contractor, and that the goods were sold to her, and not her husband." This instruction as requested fairly states the law, and the refusal to give it was error. Especially in view of the fact that it was not alleged in the declaration that the goods sold were necessaries. The statutes on that subject are as follows, to wit: Section 1087 (C. L. 1884). "All property, real, personal and mixed, and choses in action, owned by any married woman, at the time of her marriage, shall continue to be her separate property notwithstanding such marriage; and any married woman may, during coverture, receive, take, hold, use and enjoy property of any and every description, and all avails of her industry, free from any liability of her husband, on account of his debts, as fully as if she was unmarried."

Section 1088 (Id.). "A married woman shall be bound by her contracts, and responsible for torts committed by her, and her property shall be liable for her debts and torts, to the same extent as if she were unmarried. Any married woman shall be capable of making any contract with the consent of her husband, either by parol or under seal, which she might make if unmarried, and shall be bound thereby."

Section 1089 (Id.). "No married woman shall be liable for any debts of her husband, nor shall any married man be liable for any debts or contracts of his wife, entered into either before or during coverture, except for necessaries furnished to the wife after marriage, where he would be liable at common law, but each shall be liable for necessaries furnished to the husband or family of the husband and wife."

The sections above quoted were not repealed or modified by the enactment of chapter 90, Laws, 1889, page 208. That act was intended for the purpose ex-

pressed in the enacting clause. "An act to amend the laws relative to the estates of deceased persons." And it will be seen that every section of the Compiled Laws of 1884, and the act of the legislature of 1887, on that subject, which were intended to be repealed or amended were specially designated, and with great care, each section and act of the legislature is named by number, and besides the conflict, if any, is insufficient to sustain a repeal by implication. No other instructions were given which cured this error. The instructions given were as to the fact of the proprietorship of the hotel, but nowhere do the instructions state that a married woman is not liable for the debts of her husband, except for necessaries. And it was reversible error not to give the instruction asked. The jury should have been instructed fully as to the property rights of defendant Nellie Holmes, under the laws of this territory.

The eleventh assignment is, "Because the court erred in granting a new trial as to the defendant J. H. Holmes, and denying the same as to defendant Nellie Holmes."

The defendants, J. H. Holmes and Nellie Holmes, were sued on a joint contract, and joint promise for goods, wares and merchandise, and in operating and running the Magdalena hotel, and for rent for same; the verdict was against both of them jointly, then the verdict was set aside as to J. H. Holmes, and the case against him was afterward dismissed by plaintiffs below, and the judgment entered against the defendant Nellie Holmes. The verdict was an entirety, and the judgment should have been entered against both defendants, or a new trial granted as to both defendants. And it was error to set aside the verdict as to one, and enter judgment as to the other defendant. Clearly the judgment did not follow the verdict.

JOINT contract: verdict: judgment.

The defendants in error contend that a single

judgment may be entered in the case against the defendants as to whom the court holds the verdict is sustained. This was a suit against husband and wife, alleging a contract made by both of them, just as if they had been any other two persons, not husband and wife.

The statutes on this subject referred to by defendants in error, are, to wit:

Sec. 1889 (C. L. 1884). "All contracts which by the common law are joint only, shall be held and construed to be joint and several; and in all cases of joint obligations or assumptions by partners and others, suit may be brought and prosecuted against any one or more of the parties liable thereon, and where more than one person is joined as defendant in any such suit, such suit may be prosecuted and judgment rendered against any one or more of such defendants."

Sec. 1845 (Id.). "All contracts, which by the common law are joint, shall be construed to be joint and several."

These statutes do not apply to the objections raised here. It is not contended that it was not a joint and several promise as against both defendants, as alleged in the declaration, but the contention of plaintiff in error is, that the verdict was joint as against both, and that the court erred in setting aside the verdict as to one defendant and not as to both. But defendants in error contend that the court had a right to do this after verdict, and to allow them to amend by dismissing after the motion for a new trial was granted as to defendant J. H. Holmes and cites in support of that proposition, the following statute. Sec. 1911. "Each party by leave of the court, shall have leave to amend, upon such terms as the court may think proper, at any time before verdict, judgment or decree."

AMENDMENT after verdict.

It will readily be seen here that leave to so amend

is granted "at any time before verdict." This does not mean that parties may amend by the dismissal after verdict. The statute authorizing dismissals provides as follows:

Sec. 1859. "Any cause pending in any court of this territory may be dismissed by the plaintiff in said cause, at his costs, at any time before the same is submitted to the jury in causes tried by the jury, or before judgment has been rendered in causes tried by the court."

But defendants in error contend that because the obligation was joint and several, and that each of defendants below were liable, that it was not error in the court to grant a new trial as to one defendant, and allow a dismissal as to him; and enter a judgment against the other. And that, because the defendants were severally liable, that the plaintiffs had a right to dismiss as to one and have the judgment entered against the other defendant.

If that can be maintained, then the court is permitted to change the verdict found by the jury, and to decide which of two joint defendants who are liable jointly and severally, shall respond in damages assessed by the jury; because the trial having been had and verdict returned, may be plead in bar to any subsequent action against the defendant in whose favor the new trial was sustained, and the other defendant against whom judgment is entered, would have no recourse for the recovery from his codefendant for his pro rata of the indebtedness.

Defendants in error also contend, that, because it was not necessary to join the defendants, that this is, or may be treated as surplusage, and that it was not error to grant the new trial as to one, and then dismiss as to him, and take judgment as to the other.

This might have been done at any time before the verdict, as provided by the statutes, supra, but to do

it after verdict is simply to deprive the defendant against whom the judgment is entered of any remedy for future recovery against the other joint and several debtor.

The statute in contravention of the common law making all contracts which are by the common law joint only, joint and several, and permitting plaintiff to have and prosecute his suit against either, is not intended to be so used and construed as to cut off and bar any rights or remedies which the party against whom a judgment may be entered may have against his joint and several co-obligors; and the statute should be so construed as to protect both parties litigant.

Plaintiffs below could have dismissed as to either defendants, at any time before verdict, and the other party against whom the judgment was entered, could and would have had his remedy against the co-obligor, but after verdict such remedy is lost.

For the reasons above given the case is reversed and remanded for a new trial as to this plaintiff in in error. It is so ordered.

SMITH, C. J., and BANTZ, J., concur. HAMILTON, J., having been of counsel in the case, did not sit.

[No. 619. September 1, 1896.]

IN RE ASSIGNMENT OF SPITZ BROTHERS.

EXEMPTIONS—PARTNERSHIP—ASSETS OF INSOLVENT FIRM—CLAIM OF INDIVIDUAL PARTNERS.—Held: That the assets of an insolvent firm are a trust fund for the benefit of the creditors of the firm, and the individual partners are not entitled to the benefit of section 19, Laws 1887, exempting from levy and sale property of the value therein named, owned by the head of a family who is not the owner of a homestead, but only to claim such exemption out of the surplus, if any, remaining in the hands of the assignee after payment of the firm debts.

APPEAL from a judgment of the Second Judicial District Court, Bernalillo County, disallowing claims of petitioners for individual exemptions out of partnership assets in hands of assignee. Affirmed.

The facts are stated in the opinion of the court.

FELIX H. LESTER and NEILL B. FIELD for appellants.

Exemption laws should be construed liberally in favor of the debtor. Montague v. Richardson, 63 Am. Dec. 173; Carpenter v. Harrington, 37 Id. 272; Rockwell v. Hubbell, 45 Id. 252; Favers v. Glass, 58 Id. 272; Thomp. on Hom. & Exempts., sec. 5 and citations; Id., secs. 7, 731.

Property owned by a debtor as a member of a partnership is alike within the letter and spirit of the exemption laws. Stewart v. Brown, 93 Am. Dec. 578, and note; 37 N. Y. 350; Skinner v. Shannon, 44 Mich. 86; McCoy v. Bruner, 61 Id. 362; Waite v. Matthews, 50 Id. 392; Gilman v. Williams, 7 Wis. 329; 76 Am. Dec. 219, and note; Blanchard v. Paschal, 68 Ga. 32; 45 Am. Rep. 474; Spade v. Bruner, 72 Pa. St. 57; Servanti v. Lusk, 43 Cal. 238; O'Gorman v. Fink, 37 Wis. 649; Russell v. Lennon, 39 Id. 570.

The members of a partnership are the owners of its assets, and may, with the consent of each other, apply the partnership assets to the payment of individual debts as against partnership creditors. Husickamp v. Moline Wagon Co., 121 U. S. 310.

It was not incumbent upon the assignors to make any selection of exempt property, or to claim the exemption at any particular time. They might, so long as the proceeds of the property remains in the hands of the assignee, make their claim at any time, and the statute would reserve the property for them. Chipman v. Kellogg, 60 Mich. 438; Perkins v. Nichols, 17 Id. 38.

R. W. D. BRYAN and A. B. MCMILLEN for appellee.

Individual partners are not entitled to exemptions out of the partnership assets in the hands of the assignee. Story, Eq. Juris., sec. 1253; Hollins v. Coal Co., 150 U. S. 385; Bank v. R. R., 11 Wall. 624; U. S. v. Hack, 8 Pet. 271; Murrill v. Neill, 8 How. 414; State ex rel. v. Spencer, 64 Mo. 355; In re Corbett, 5 Sawy. 206; 2 Bates on Part., sec. 1131; Giovani v. Bank, 55 Ala. 305; 28 Am. Rep. 723; Tirrell v. Hurst, 76 Ala. 588; Levy v. Williams, 79 Id. 171; Schlapback v. Long, 90 Id. 525; Aiken v. Steiner, 98 Id. 355; Richardson v. Adler, 46 Ark. 171; Bishop v. Hubbard, 23 Cal. 514; Kingsley v. Kingsley, 39 Id. 665; Cowan v. Creditors, 77 Id. 403; McCrimmon v. Linton, 36 Pac. Rep. 300; Bates v. Callender, 16 N. W. Rep. 506; State v. Bowden, 18 Fla. 17; Trowbridge v. Cross, 117 Ill. 109; Love v. Blair, 72 Ind. 104; State v. Emmons, 99 Id. 452; Smith v. Harris, 76 Id. 104; Ex parte Hopkins, 104 Id. 157; Drake v. Moore, 66 Iowa, 58; Hoyt v. Hoyt, 69 Id. 174; Guptil v. McFee, 9 Kan. 30; Succession of Staufer, 21 La. 525; White v. Heffner, 30 Id. 1280; Thurlow v. Warren, 82 Me. 164; Pond v. Kimball, 101 Mass. 105; Holmes v. Winchester, 138 Id. 542; Baker v. Sheehan, 29 Minn. 235; Prosser v. Hartley, 35 Id. 340; Robertshair v. Hanway, 52 Miss. 713; Wooldridge v. Irving, 23 Fed. Rep. 677; Julian v. Wrightsman, 73 Mo. 569; Lindley v. Davis, 6 Mont. 453; People v. Till, 3 Neb. 261; Wise v. Frey, 7 Id. 134; Lingley v. Raymond, 9 Id. 40; Rhodes v. Williams, 12 Nev. 20, 28; Terry v. Berry, 13 Id. 514; Arnold v. Hagerman, 45 N. J. 186; Gaylord v. Imhoff, 26 O. S. 317, 20 Am. Rep. 762; Bonsall v. Comly, 44 Pa. St. 442; Clegg v. Houston, 1 Phila. Rep. 353; Hally v. Hampton, 160 Pa. St. 18; Spiro v. Paxton, 3 Lea (Tenn.), 75; Chalfaut v. Grant, Id. 118; Gill v. Lattimore, 9 Id. 381; Short v. McGrudder, 22 Fed.

Rep. 46; In re Hafer, 1 Bank Reg. 547; In re Price, 6 Id. 400; In re Blodgett, 10 Id. 145; In re Handlin, 12 Id. 49; In re Tonne, 13 Id. 170; In re Stewart, Id. 295; In re Bootleroyd, 14 Id. 223; In re Sauthoff, 16 Id. 181; In re Hughes, Id. 464; In re Craft, 17 Id. 324; Id. 324; In re Melvin, Id. 543; In re Bjornstat, 18 Id. 282; In re Corbett, 5 Sawy. 206; Bank v. Corbett, Id. 543; In re Handlin, 3 Dill. 290; In re Sauthoff, 8 Biss. 35.

LAUGHLIN, J.—On the eighth day of December, 1894, the firm of Spitz Brothers, a co-partnership composed of Edward Spitz and Berthold Spitz, made an assignment for the benefit of their creditors to M. W. Flourney, as assignee. The firm of Spitz Brothers were and had been for some time previous to the date of the assignment doing a general mercantile business at Albuquerque, in Bernalillo county, and at Cerrillos, in Santa Fe county, New Mexico. The deed of assignment is in the usual and proper form, and conveyed to said Flourney, as assignee in trust, certain tracts and parcels of real estate, describing the same; "and also all the goods, chattels and effects, and property of every kind, real, personal, and mixed, of said firm of Spitz Brothers, and the said Edward Spitz and the said Berthold Spitz, together with all claims and demands whatsover and wheresoever, including choses in action, suits now pending, and judgments, except, however, so much as may under the laws of the territory of New Mexico be exempt to each of the above grantors."

Thereafter, on the twenty-third day of January, 1895, the said Edward Spitz and Berthold Spitz filed their separate petitions in the district court for Bernalillo county, in which petitions they each stated under oath that each was a resident of the territory, the head of a family, and was not the owner of a homestead,

and that there was a clause in the said deed of assignment expressly reserving from the said conveyances so much property conveyed as was, under the laws of this territory, exempted to each of said petitioners; and prayed for an order on the said assignee requiring him to set apart from the proceeds of said estate, and to pay over to each of said petitioners the sum of $500, as the equivalent of the amount of exemptions allowed in such cases to residents and heads of families who do not own a homestead. The district court granted the prayer and issued a rule on the assignee to pay over the amounts claimed in the petitions, or show cause at a fixed date, if any reason he had why not.

The assignee answered the rule and showed that neither said Edward or Berthold Spitz, nor their agent or attorney, ever selected any property, real or personal, from assets of said estate in his hands as assignee, nor claimed any of said property as an exemption; and that the appraised value of the assets of said estate of said Spitz Brothers amounted to $4,366.96; and that the partnership debts of said firm of Spitz Brothers amounted to the sum of $10,000, or more.

After hearing, on the answer to the rule, the court found that neither the said Edward nor the said Berthold Spitz was entitled to any exemptions out of the partnership assets except out of any residue which might remain after all the partnership debts were paid out of the partnership assets of said firm, from which ruling petitioners appealed to this court.

The appellants assigned three grounds of error in the court below for reversal, but only one of which will be considered, as that is sufficient for a full determination of the case on its merits; that assignment is in the following words, to wit:

"Third. The court erred in refusing to grant to the respective petitioners the exemptions prayed."

The provisions of the statute under which appellants seek to establish their right to the exemptions claimed in their petitions in this case are as follows, to wit: "Sec. 1. Every person who has a family, and every widow may hold the following property exempt from execution, attachment or sale for any debt, damage, fine, or amercement, to wit: * * *

EXEMPTIONS: partnership: assets of insolvent: claim of individual partners.

"Sec. 19. Any resident of this territory, who is the head of a family, and not the owner of a homestead, may hold exempt from levy and sale real and personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted."

"Sec. 10. This act shall be so construed as to apply to all species of indebtedness, against exempted property, except taxes. * * *." Laws of 1887, p. 72.

The act of the legislature under which this assignment was made and authorized, provides as follows, to wit:

"Sec. 35. All property, both real and personal, exempt from execution under the laws of this territory shall not be conveyed by deed of assignment, and if enumerated therein shall not pass to the assignee, but shall be reserved for the benefit of the assignor, or his family, to be set off and appraised by the appraiser mentioned in the first part of this act." Laws 1889, p. 158.

The quotation of the last statute is given in full to show that the appellants lost none of their rights by the deed of assignment, if any they had under the exemption statute. And this leaves for determination the proposition contended for by counsel for appellants with much force and seriousness, which is, can each and every member of an insolvent partnership, who is

a resident of the territory, the head of a family and not the owner of a homestead, claim and hold out of the partnership assets of the insolvent firm, $500 or the equivalent in property? We think not.

Appellants contend in their brief in support of this proposition, that property owned by a debtor as a member of a partnership is alike within the letter and spirit of the exemption laws. The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less, whatever it be within the limitations of the statute the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which its loss might reduce the family depending on him for support.

FREEMAN in his work on executions, section 221, says: "It often happens that property designated as exempt by statute belongs to two or more persons, either as cotenants or copartners. The question then arises, whether this property must be treated as exempt to the same extent as if held in severalty," and says that "cotenants and copartnership have been placed on the same footing in a majority of the states, and both have been given the full benefit of the exemption laws. This position, even when the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by general rule that these statutes must be liberally construed so as to promote the policy on which they are based, and accomplish the purposes to which they are directed."

The proposition stated here that the question had been so decided by a majority of the states, may have been true at the time the text was written, but it is not true at this time, as it will be found on an examination that a majority of the state courts and federal courts have held that partnership property is in the nature of

a trust fund, and held for the benefit of the creditors of the partnership; and that the partners can not claim and hold exemptions out of the partnership assets.

In support of the propositions stated by Mr. FREEMAN, supra, and contended for by the appellants, the following citations are made: Stewart v. Brown, 37 N. Y. 350; Gilman v. Williams, 7 Wis. 329; Skinner v. Shannon, 44 Mich. 86; McCoy v. Bruner, 61 Id. 362; Waite v. Matthews, 50 Id. 392.

In Skinner v. Shannon, supra, the court say:

"That the several members of a copartnership come within the language of the statute and constitution, there should be no question, and that they by becoming members of a firm do not place themselves beyond the pale of the reason of the law, would seem clear. The same reason which exists would seem to apply with equal force to each and every member of the firm. The whole object of the law is to prevent a person from being stripped of all means of carrying on his business, and in this respect no distinction can exist between those who are members of a firm and those who are not. * * *. The creditor, in selling goods to an individual, knows that a certain portion of his debtor's property is not and will not be subject to his demands. And so if he sells to a firm, and the firm or each member thereof is entitled to a statutory exemption, the creditor sells in view of the hazard."

In the case of Blanchard et al. v. Paschal, 68 Ga. 32, which is similar in all respects to the case at bar, the court say: "The theory of plaintiffs in error is that the partnership property must go to the payment of partnership debts, before any individual interest can exist, whereas, in fact and in law, the individual members of a firm are the real owners of the partnership property. And although the law directs how debts shall be paid, it never loses sight of the fact that the partnership is made up of individuals who own the assets."

It will be seen on a careful examination of all the authorities in support of this proposition, that the courts so holding have apparently ignored a well settled principle of law, that is that the assets of an insolvent firm is a trust fund for the benefit of the creditors of the firm; this position is supported by federal as well as state authorities in a long line of well reasoned cases, as well as by a number of text writers.

"The joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity: A long series of authorities (as has been truly said) has established this equity of joint creditors, to be worked out through the medium of the partners; that is to say, the partners have a right, inter se, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right except to his own share of the residue; and the joint creditors are, in case of insolvency, substituted in equity as to the rights of the partners, as being the ultimate cestui que trust of the fund to the extent of the joint debts. Story's Eq. Jur. [5 Ed.], sec. 1253; 3 Kent. Comm. 36.

"Whenever a partnership is becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors." Hollins v. Bridefield C. & I. Co., 150 U. S. 385.

"It has been repeatedly determined, both in the British and American courts, that the property or effects of a partnership belong to the firm, and not to the partners, each of whom is entitled only to a share

of what may remain after payment of the partnership debts, and after settlement of the accounts between the partners; consequently that no greater interest can be derived from the voluntary sale of his interest by one partner, or by a sale of it under execution." In Field v. Taylor, 4 Ves. Jr. 396, it was said that a party coming into the right of partners, comes into nothing more than an interest in the partnership, which can not be tangible, can not be made available, or be delivered but under an account between the partnership and the partners, and it is an item in the account that enough must be left for the partnership debts." Bank v. N. O. & Carrollton R. R. Co., 11 Wall. 624.

"It is a rule too well settled to be now called in question that the interest of each partner in the partnership property is his share in the surplus after the partnership debts are paid, and that surplus only is liable for the separate debts of such partners." United States v. Hock, 8 Pet. 271; Murrill v. Neill, 8 How. 414.

There seems to be no doubt at this time but that the partnership assets of an insolvent firm constitute a trust fund for the benefit of the creditors of the partnership. And the only way in which individual partners of the insolvent firm could avail themselves of an exemption out of the partnership assets, before the partnership debts are paid, would be by a direct statutory remedy, and we have no such statute here. It is true that in the case of Stewart v. Brown, 37 N. Y. 350, the court held that where the word "person" appeared in the statute it meant "persons" in the plural; and that construction was given because of a general statute in that state. And while we have a statute to the same effect (sec. 2614, C. L. 1884), such a construction as placed upon the statute by the court in the case above cited is, in our opinion, unwarranted in the face of the authorities above cited.

Bates, in his work on the law of Partnerships, section 1131, says:

"On execution against the partnership property on judgment for a partnership debt, no exemption is allowed either to the partnership as a body, or to the individual members thereof, out of the joint assets. The partnership as a body can not claim because the homestead and exemption statutes apply to several and not to joint claims, and the partnership is neither an entirety, an individual, nor the head of a family. An individual partner can not claim it because no partner has a proprietorship in any specific chattel, his interest being a share in the surplus after payments of debts and copartnership claims." But that "the contrary rule prevails in Georgia, Michigan, New York, North Carolina, Texas, and Wisconsin."

In the case of In re Handlin, 3 Dillon, 290, Circuit Judge DILLON says: "There is no exemption to the firm, as such, nor is it contended that there can be. But each of the partners' claims are individual exemptions to the amount of two thousand dollars, out of the firm property, and at the expense of the firm creditors; and if the claim is valid it would be equally so if there were six partners, instead of two." * * * "While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate, at the expense of the joint creditors."

The supreme court of Kansas, in a very able opinion, in the case of Guptil v. McFee, 9 Kan. 30, say: "But if we adopt the theory, which is the correct one, that the exemptions are in favor of individuals only, and not in favor of copartnerships or corporations, we are equally led to the conclusion that partnerships are not exempt from execution."

And in Pond v. Kimball, 101 Mass. 107, the supreme court of that state, as early as 1869, held that, "property belonging to the firm can not be said to belong to either partner as his property. He has no exclusive interest in it. It belongs as much to his partners as it does to him, and can not in whole or in part be appropriated (so long as it remains undivided) to the benefit of the family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business, and the settlement of his accounts with the firm."

There is almost a limitless number of adjudicated cases supporting this doctrine, both federal and state, and it is only necessary to cite a few in addition to those already referred to. McCrimmon v. Linton, 36 Pac. Rep. (Colo.) 300; Aiken v. Steiner et al., 98 Ala. 355; Richardson v. Adler, 46 Ark. 43; Kingsley v. Kingsley, 39 Cal. 665; State v. Bowden, 18 Fla. 17; Ex parte Hopkins, 104 Ind. 157; Hoyt v. Hoyt et ux., 69 Iowa, 174; Terry v. Berry, 13 Nev. 514; Short v. McGruder, 22 Fed. Rep. 46; Hally v. Hampton, 160 Pa. St. 18.

A long list of federal decisions are cited by counsel for appellee, receiver from the bankrupt register in support of these authorities.

If the contention made by the appellants is sound, that each of the partners of an insolvent copartnership is under the statute entitled to claim and have an exemption of $500 out of the partnership assets at the expense of the partnership creditors as the equivalent of his homestead when he is not the owner of one, then it is sound as to any number and all the copartners under like circumstances; and if one member of the copartnership furnishes all the capital and the others conduct the business as profit partners only, and contract partnership obligations, and become insolvent, then each of the profit partners would be entitled to an

exemption, out of the expense first of the partnership creditors, and, secondly, at the expense of the partners who furnished all of the capital for the enterprise or business, if he should happen to have private property out of which the partnership debts could be collected, thus affording the profit partners an opportunity to secure and hold the exemptions out of the property in which they never had any interest and out of a business in which they never invested a dollar of their own money. Such a proposition is neither sound in morals nor in law. There is no principle of the law better settled than that partnership assets must first be applied to the payment of partnership debts. And to attempt to establish any other rule would be to encourage the thriftless and unscrupulous at the expense of the fruits of honest labor, and would be contrary to business principles and tend to destroy commercial confidence.

Suppose one partner had put into the business three fourths, and the other one fourth, it would be clearly unjust and inequitable to hold that he who had put into the business only one fourth of the capital should be permitted to withdraw from the firm assets an equal moiety with him who had invested three fourths of the capital; and if the principle contended for is sound with respect to any partnership it is sound with all partnerships.

It is contended by appellant's counsel, with considerable force, that statutes allowing exemptions should be and are construed with great liberality in favor of the "poor debtors," that no doubt is true and it is the proper construction, but this is not the class of cases requiring a liberal or sympathetic construction, because common experience of every day life teaches that in perhaps a majority of the cases of insolvency the members of the insolvent firm, while doing a thriving business on the capital of their creditors, live in oppulence, contract obligations with that other class of people

known as "poor creditors" who are unable to lose the results of their honest toil for the benefit of those who have lived in luxury while holding themselves out to the world as amply and financially responsible for all their obligations, and then make a deed of assignment, and as if by the hand of the magician they are converted into "poor debtors," and raise the alarm that they are being pursued and oppressed by their creditors.

Our statute is fairly liberal in providing exemptions to the poor and needy. It exempts a homestead to the heads of families to the amount of $1,000, and the proceeds of the homestead when sold to that extent for one year, and other personal property amounting to several hundred dollars, and the personal earnings of the debtor or his minor child or children for three months, and it is this class of debtors upon whom the law always sheds its mantle of charity in its protecting care of the weak against the strong, and in whose favor the law is and should always be construed liberally.

There was no error in the court below in refusing to grant the prayer for exemptions as prayed for by the appellants, and for the foregoing reasons the judgment of the lower court is affirmed. And it is so ordered.

SMITH, C. J., and BANTZ and HAMILTON, JJ., concur.

[No. 652. September 1, 1896.]

ALEJANDRO SANDOVAL, COLLECTOR OF COUNTY OF BERNALILLO, PLAINTIFF IN ERROR, v. RICHARD B. MEYERS, TREASURER OF COUNTY OF BERNALILLO, DEFENDANT IN ERROR.

LICENSES, DRAMSHOP—COMPENSATION OF COLLECTOR—CONSTRUCTION OF STATUTES.—Held: That the act of 1895, chapter 34, providing that the collector shall collect all taxes and licenses "remaining unpaid," and that might thereafter be "levied and assessed," and shall receive as compensation for his services four per cent of the amount collected, applies only to licenses which continue to be issued under the sections of Compiled Laws, 1884, yet operative on the nine remaining occupations, and not to liquor licenses, which can not "remain unpaid," under the act of 1891, unless issued in violation of law.

ERROR, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiff in error.

A strained interpretation, by interpolating into the language used by the legislature an exception not therein expressed, and not necessarily implied from the language used, should not be favored in construing a statute of this character. Sedg. Stat. Const., 251, 265; Priestman v. U. S., 4 Dallas, 30.

While it is true that in construing a doubtful statute, and for the purpose of ascertaining the legislative intent, all acts on the same subject-matter are to be taken together, the doctrine does not go to the extent of controlling the language of a statute upon the ground of supposed policy or previous enactment. Goodrich v. Russell, 42 N. Y. 177.

Nor can other statutes in pari materia be resorted to when the language of the one under construction is plain and explicit. Ingalls v. Cole, 47 Me. 530. See, also, Cortesy v. Territory, 6 N. M. 682.

G. W. JOHNSTON for defendant in error.

"By necessary implication this does away with the use of the collector. He has nothing to do with the collection of licenses, and is, therefore, not entitled to his ten per cent by reason of the section cited. Board of Education v. Robinson, 7 N. M. 231.

Where there is an apparent conflict of laws the rule of construction is that both will stand, if, by any possible means, they can be made to harmonize. If the law of 1895 repeals that of 1891, it is only by implication. Suth. Stat. Const., sec. 138. See, also, as to repeals by implication, Wood v. U. S., 16 Pet. 362.

"Whenever one person obtains possession of money which, ex aequo et bono, belongs to another, the latter may maintain an action to recover it." Peterson v. Foss, 6 Pac. Rep. (Ore.) 397; Gaines v. Miller, 111 U. S. 395. See, also, State v. St. Johnsburg, 10 Atl. Rep. (Vt.) 533; Walker v. Conant, 31 N. W. Rep. (Mich.) 786; Bland v. Williams, 13 Id. (Minn.) 42; Bank v. Bank, 19 Fed. Rep. 301; 4 Wait's Acts and Def. 507; O'Conley v. Natches, 40 Am. Dec. 87.

BANTZ, J.—This is an action to recover from the collector of Bernalillo county certain moneys collected upon dramshop licenses. He claims that he rightfully retained the money as commissions of four per cent, and was authorized so to do under the act of 1895. Under section 2901 of the Compiled Laws of 1884 are enumerated some ten different occupations upon which license taxes are imposed, and in this number is included that of retail liquor dealer. Section 2903 provides that the assessor shall prepare a list of persons liable to pay the license taxes, and return the same to the county clerk, who is to indorse thereon an order, in the name of the county commissioners, for their collection by the collector. Section 2904 provides for the collection of

LICENSES, dramshop: compensation of collector: construction to statutes.

these licenses by the collector. Section 2906 provides a penalty of fifty per cent if the license be not paid to him within twenty days, and he was empowered (section 2907) to distrain for nonpayment of the same. The assessor (2909) was allowed five per cent "on the amount of taxes and licenses assessed and approved by the county commissioners," as soon as the tax list was delivered to the collector. The collector (2910) was allowed "ten per centum upon all license taxes collected by him." In the place of the machinery thus provided, the legislature in 1891 amended the law in respect to retail liquor dealers,—one of the occupations enumerated in section 2901,—and provided a very simple and inexpensive method. It required, in substance, the applicant for license to apply for it to the county commissioners if the business was to be conducted outside of a city or town, or to the mayor or town council if the business was to be conducted inside of a city or town. The license was not to be granted before such application, and was not to be issued until the license tax was paid into the hands of the county treasurer by the applicant for the license. It was also made a misdemeanor to sell liquor without such license. Acts 1891, chap. 9. It will thus be seen that, as to this single occupation, it ceased to be the duty of the assessor to include those engaged in it in the list of occupations to be prepared by him; it ceased to be the duty of the clerk to include them in the order to the collector; and it ceased to be within the duty or power of the collector to receive such licenses, or to collect them by distress or otherwise. Under the system provided by the act of 1891 in reference to dramshop keepers, there was no longer such a thing as the levy and assessment of such license, and there could be no such thing as licenses "remaining unpaid." Strictly speaking, such a license tax as that provided for under the act of 1891 is not levied or assessed. Cooley, Taxation, p.

258, chap. 12. It is a permission granted under the police power. Cooley, Taxation, p. 396. The similarity in methods of regulations of licenses under the laws of 1884 to the levy and assessment of taxes doubtless suggested the employment of terms similar to the terms in reference to taxes. But, whatever may be the names employed, the essential thing is that, as to all occupations except the one embraced in the act of 1891, the assessor, county clerk and collector continued to possess the power, and were charged with the duties, prescribed in the sections of the Compiled Laws of 1884, to which we have alluded, and these duties were similar to those performed in reference to ordinary taxes; but, as to the one occupation of retail dramshop keepers, the powers and duties of these officers entirely ceased after the passage of the act of 1891. In 1895 another act was passed, which provides that the collectors shall "collect all taxes and licenses now remaining unpaid, and also that may hereafter be levied and assessed and shall receive as compensation for their services four per centum of the amount collected." Acts 1895, chap. 34. The general terms of the power of the collector under the act of 1895 were, we think, qualified and limited by the words "remaining unpaid," and "levied and assessed." The only licenses which could have remained unpaid, unless issued in violation of the law, and the only ones which could in any sense be said to be levied and assessed, were those which continued to be issued under the sections of the Compiled Laws of 1884 yet remaining operative,—that is to say, the nine remaining occupations; and as to all of these licenses the collector's compensation was reduced from ten to four per cent. To hold that the act of 1895 applies, not only to these, but also to the retail liquor licenses specially covered by the act of 1891, would be to hold that the act of 1895 repealed the act of 1891 by implication. In ascertaining a repeal by implication, it is

always essential to take into consideration other statutes in pari materia, and all will be allowed to stand which are not in conflict. "If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced, and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law, relating to the same matter, unless the repugnancy between the two is irreconcilable." Suth. Stat. Const., sec. 152. Of course, if the legislative intent is clear, there is nothing left for construction, but the use of general words in a statute is not alone to be regarded. If a general statute can be harmonized with one applicable to a particular class or subject, it would be the duty of the court to do so, rather than conclude a repeal by implication. The methods required under the act of 1891, of an application to the clerk by the retail dealer, and the payment by him to the treasurer of the license tax precedently to the issuance of the license, remain untouched by any line or word of the act of 1895, nor is any new or different method provided instead. Nor are the methods provided in the laws of 1884 revived. If these methods provided by the act of 1891 remain unrepealed, and they must be so regarded, then no license can be issued until applied for by the dealer, and not even then until the money is deposited with the treasurer. Repeals so comprehensive can not arise upon such doubtful and vague language by implication. The judgment will be affirmed.

HAMILTON and LAUGHLIN, JJ., concur.

[No. 663. September 1, 1896.]

MARY J. WILLEY, PLAINTIFF IN ERROR, v. BERTHOLD RENNER, DEFENDANT IN ERROR.

PARTNERSHIP, WHAT CONSTITUTES.—A contract whereby one leased to another a mill on the agreement of the other to conduct the business, hire and pay employees, keep the mill in repair, furnish accounts of receipts and expenditures, and to pay the lessor one half of the net receipts, the flour, etc., on hand at the termination of the lease to be the property of the lessor, who was to pay the lessee one half its value, was a partnership agreement.

ID.—DISSOLUTION—ACCOUNTING AND SETTLEMENT—ASSUMPSIT—JURISDICTION.—In an action of assumpsit on such contract to recover an amount alleged to be due by reason of partnership transactions, where the record disclosed that, though the firm was dissolved, the accounts and business of the firm remained unsettled at the time of the institution of the suit,—Held: That a court of chancery alone had jurisdiction to settle the accounts, and the district court erred in retaining and submitting the cause to the jury.

ERROR, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County.

Reversed and remanded (with directions); BANTZ, J., dissenting.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiff in error.

The court below was correct in holding that the contract was a partnership agreement. Dalton v. Hawes, 37 Ga. 115; Parker v. Canfield, 37 Conn. 250; Wood v. Beath, 23 Wis. 258; Whitney v. Ludington, 17 Id. 141, 142; Miller v. Price, 20 Id. 120; Cushman v. Bailey, 1 Hill. 526; Dob v. Halsey, 16 Johns. 34, 40.

Partnership accounts can not be settled in an action at law. 17 Am. and Eng. Ency. of Law, 1254, 1273. See, also, Lamalere v. Caze, 14 Fed. Cas. 965; Id., 1

Wash. 435; Harris v. Harris, 39 N. H. 48, et. seq.; Andrews v. Allen, 9 S. & R. 242, 243; Baxter v. State, 9 Wis. 44.

B. F. ADAMS for defendant in error.

If the contract was a contract of partnership, as plaintiff in error claims, she should have demurred to the declaration. Chitty on Pld. 639, et seq.; Steph. on Pld. 157.

Having pleaded, plaintiff in error is in no position to complain, and this point can not be considered in a review of the case. Beall v. Territory, 1 N. M. 509; Watkins v. U. S., 9 Wall. 762; Aurora City v. West, 7 Id. 92; U. S. v. Boyd, 5 How. 51; Overland Dispatch Co. v. Wedeles, 1 N. M. 528; Young v. Martin, 8 Wall. 357; Clearwater v. West, 1 Id. 42.

The contract sued on is not a contract of partnership, and plaintiff and defendant were not partners with respect to each other. Waugh v. Carver, 1 Smith's Lead. Cas. 1327.

To constitute a partnership inter se there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property, a right which, by the dissolution of the partnership by the death of one passes to the survivor, and not to the representatives of the deceased. Donnel v. Harshe, 67 Mo., and citations; Musser v. Brink, 82 Id. 242; Ashby v. Shaw, Id. 76; McDonald v. Matney, Id. 358; Newspaper Co. v. Farrell, 88 Id. 594.

If the contract was a contract of partnership, and all business had been fully settled, then an action at law would lie for the balance due from either party to the other. Silver v. R'y Co., 5 Mo. App. 381.

HAMILTON, J.—This is an action of assumpsit brought in the district court of Bernalillo county by

the defendant in error against the plaintiff in error, and is based upon a contract containing, among other things, the following:

"Agreement made this nineteenth day of June, 1889, between Mary J. Willey, of the first part, and B. Renner, of the second part, both of Albuquerque, New Mexico. The party of the first part does hereby rent and lease unto the party of the second part that certain flouring mill, situated in block 42 of the town of Albuquerque, known as the 'Albuquerque Mills,' for the term of one year, beginning on the first day of July, 1889, subject to the conditions hereinafter set out, on the part of the party of the second part. The party of the second part agrees and promises, in consideration of the renting above specified, to take charge of said mill, and run the same to the best of his ability during the term aforesaid; to hire and pay all help required to run said mill; to keep the same in repair, and to furnish all supplies needed to operate the mill; to keep accurate accounts of all receipts and expenditures in said business and with the customers of said mill; and after deducting from the gross receipts all expenditures for wages, repairs, and supplies, to pay over to the party of the first part one half of the residue or remainder of such receipts, such payments to be made weekly each Saturday night, or oftener, at the option of the party of the second part. He is also to furnish said party of the first part from said mill all flour and meal that she may require for her household use, and all mill feed she wishes for her horse, cow, chickens, or other domestic creatures of that kind." The agreement then provides that the said contract may be terminated at any time by either party upon two weeks' notice in writing of the intention so to do. The contract then contains the following provision: "Upon the termination of this agreement, any wheat, corn, or flour on hand shall remain the property of the party of

the first part, who shall pay to the party of the second part one half of the fair value thereof, such value to be ascertained, in case said parties fail to agree thereon, by arbitrators to be selected one by each party, such abitrators, if they fail to agree, to select a third, whose decision shall be final. The business to be conducted on a cash basis, and no credit given.

"MARY J. WILLEY.
"B. RENNER."

From the testimony offered on the trial below it appeared that the plaintiff took possession of the mill property under the said contract, and ran the same during the months of July and August, up to the first day of September, 1889; that he furnished to the defendant weekly statements purporting to show the amount of receipts and expenditures made by the plaintiff in the operation of said mill, and paid to the defendant what he claimed to be the defendant's proportionate share of the net profits realized in the operation of said mill. These statements were delivered to the defendant, and were received by her, as the testimony shows, without any objection at the time they were received. It also appears that there were some articles of property in the mill at the time the plaintiff took hold of it under the contract, which were used by him in its operation. The plaintiff ran the mill under this contract until about the middle of August, 1889, when a disagreement appears to have arisen between him and the defendant in relation to its operation. This controversy appears to have grown out of the fact that the defendant was dissatisfied with the manner in which the plaintiff was operating the mill, and in the fact that the plaintiff was not keeping accurate accounts of the business, and was not properly and correctly accounting to the defendant for her share of the profits. The plaintiff, on the other hand, claimed that he had accurately accounted to the defendant each week for all the moneys

realized in the operation of the business. This difficulty led to the plaintiff's giving notice to the defendant that he would give up the mill, which he did on the first day of September, 1889. It further appears from the testimony offered by the plaintiff that at the time the plaintiff gave up the mill and surrendered it back to the defendant an effort was made between them to come to a settlement in reference to the business, the plaintiff claiming that he was entitled to certain money due on account of one half of the value of the wheat, corn, and other articles left in the mill at the time he gave it up. The defendant, upon the other hand, claimed that the plaintiff was not entitled to anything whatever, but that, on the contrary, the plaintiff was indebted to the defendant on account of the net profits realized from the operation of the mill, and also that he owed the defendant certain other sums of money growing out of the business transactions of the partnership. The trial resulted in a verdict for the plaintiff for the sum of $130.80, and a judgment was rendered thereon. After unsuccessful motion for a new trial, this writ of error has been prosecuted.

In the trial below the court held that the above contract was one of partnership, creating a partnership between the plaintiff and the defendant. In this, we think that the court was correct, and was sustained in that view by an abundant weight of authority. Wood v. Beath, 25 Wis. 258; Miller v. Price, 20 Wis. 120; Dob v. Halsey, 16 Johns. 34, 40; Parker v. Canfield, 37 Conn. 250. There are, however, various grounds of error assigned and insisted upon. Without giving these in full and in detail, we may say that the point upon which the case must be determined arises under the grounds of error suggested in the tenth, eleventh, twelfth, and thirteenth assignments of errors. Combining these several grounds of error together, they are, in sub-

PARTNERSHIP, what constitutes.

stance: That the court erred in instructing the jury that the keeping of correct accounts by the plaintiff and payment to the defendant of all sums coming to her, at the stated times provided for in the contract, and the payment of all bills, constituted a settlement of the partnership, and that the court erred in leaving to the jury the consideration of the question as to whether there had been a settlement between the plaintiff and the defendant of the partnership affairs prior to the time of the institution of the suit. The court having determined that the contract upon which the suit was brought created a partnership between the plaintiff and the defendant, the question is: Did the testimony show a settlement between the plaintiff and the defendant of all of the partnership business in such a manner as to entitle the plaintiff, as one of the partners, to maintain this suit against the defendant?

It is a proposition so well settled as to scarcely require authority to support it that one partner can not maintain an action at law against another partner to recover an amount claimed by him by reason of partnership transactions until there has been a final settlement of the affairs of the partnership by discharging its liabilities and collecting its assets, and definitely ascertaining the surplus and the share to which each member of the firm would be entitled. Until a final settlement is effected, until the parties come together and have an adjustment of all of the business growing out of the firm, and until it is ascertained what is due one partner under such settlement, the only remedy of the partner is to apply to a court of equity for a dissolution of the firm, and for an accounting as to the partnership business. 2 Bates, Partn., sec. 849. While the business of a partnership remains unsettled, no action at law can be maintained by one partner against another. Harris v. Harris,

DISSOLUTION of partnership: accounting and settlement: assumpsit: jurisdiction.

39 N. H. 48, et seq.; Burns v. Nottingham, 60 Ill. 531; Ridgway v. Grant, 17 Ill. 117; Chadsay v. Harrison, 11 Ill. 151; Frink v. Ryan, 3 Scam. 322. See, also, to the same effect, Wood v. Beath, 25 Wis. 254; Miller v. Price, 20 Wis. 124; Dob v. Halsey, 16 Johns. 34; 17 Am. and Eng. Ency. of Law, 1254, 1273. The accounting and settlement and the striking of a balance must have the express or implied approval of all of the partners in order to make it binding. Lamalere v. Caze, 14 Fed. Cases, 65. It may be true that, if one partner makes a full settlement of the accounts of the partnership affairs, and presents them to the other partner, and the other partner retains such accounts for a considerable length of time without objection thereto, it might be said that he approved the same by his silence, and would render himself liable upon a balance therein stated. But the rule is universal, and, so far as we know, without exception, that there must be an implied or an express assent on behalf of the partners to the adjustment and settlement of the accounts, and the balance which may be found as a result of that settlement, to enable one partner to maintain an action against the other. Does the record in this case show that the plaintiff and the defendant had such a settlement of the partnership affairs which met the assent and approval of both, by which the accounts were taken, and a balance ascertained, so as to enable the plaintiff to maintain his suit? It appears from the testimony of the plaintiff that he had full charge of the business of the mill, that he kept the accounts, that he purchased the supplies, that he sold the product of the mill, and that he had entire charge of all the business. He claims that he furnished to the defendant statements each week of the amount of the business done by the mill during that week, and paid to her her proportionate share of the net profits. The defendant did not give to the plaintiff any receipts upon the receiving

of these statements, but only accepted them without any comment, either approval or disapproval, at the time they were received. The business ran along in this way until the fourteenth or fifteenth of August, some six weeks after the business began. It appears by the plaintiff's testimony that about this latter day the defendant came into the mill, and had some talk with the plaintiff as to the manner in which he was running the business; that she was dissatisfied, and made her dissatisfaction manifest to the plaintiff; that she then stated to customers not to come into the mill; that the plaintiff was swindling them. He also stated that after this trouble he gave the defendant notice that he would give up the mill, and he asked for a settlement of the accounts. It further appears from the testimony that Mr. Clancy, who was the agent of the defendant, came to the plaintiff, in order to bring about a settlement of the affairs of the mill. Mr. Clancy, as the agent of the defendant, and the plaintiff, had some controversy as to the condition of the business. The plaintiff claimed that there was money due and coming to him from the mill. The defendant, through her agent, Mr. Clancy, insisted that there was nothing due to the plaintiff, and ordered him out of the mill. It is stated by the plaintiff that at this time, when an effort was being made between him and Clancy to reach a settlement, he gave a statement of everything to Mr. Clancy, and that Mr. Clancy refused to allow him anything, stating: "I don't owe you nothing. You get out of here!" This was the statement made by Clancy to the plaintiff ordering him out of the mill. The testimony of the plaintiff as to this attempted settlement is in part as follows:

"Q. Your accounts show he did owe you something, don't they? A. Certainly he owed me.

"Q. And he told you he didn't owe you anything, and yet you swear he accepted your accounts without objection? A. Yes, sir. Half of the stuff in the mill

was mine, and, besides, cash money I loaned out of my own money.

"Q. And he told you he didn't owe you anything, and to go out of the mill? A. Yes, sir.

"Q. And that is the last settlement you had? A. Yes; but that was no settlement.

"Q. That was the last settlement of accounts that you had? A. Yes, sir."

It also appears in the letter of the plaintiff attached to his testimony that the plaintiff wrote to Mr. Clancy on August 15, some two weeks before, asking him for a settlement, and saying in the letter, "I wish you come here, and settle with me." An examination of the testimony of the plaintiff and the defendant contained in this record clearly discloses the fact that there was no settlement or adjustment of the accounts and business of the firm. While it is true that the dissatisfaction and difficulty which had arisen between the plaintiff and the defendant as to the operation of the business, resulting in the notice given by the plaintiff, and his quitting the mill, operated as a dissolution of the firm, it did not in any manner operate as a settlement of the partnership accounts between the plaintiff and the defendant as to the business of the firm. While the firm was dissolved, the accounts and business of the firm remained unsettled at the time the plaintiff instituted this suit. It is therefore our opinion that a court of chancery alone had jurisdiction to adjust and settle these accounts of the partnership between the plaintiff and the defendant, and that the action of the district court in retaining the cause and submitting it to the jury under the testimony contained in the record was error. The case should therefore be reversed and remanded, with directions to the district court to dismiss the suit.

SMITH, C. J., and LAUGHLIN, J., concur.

BANTZ, J. (dissenting).—There was evidence to show that accounts showing receipts and disbursements were furnished each week by Renner to Willey, and at the same time the cash balances were each week paid over. There was also evidence to show that no objection was made to the accuracy of the accounts on the balances so paid at the time. In this condition the partnership, if a partnership, was dissolved, and Willey took possession of the stock in trade. By the terms of the contract Renner was entitled to be paid one half of the value of certain articles of such stock, and this action is to recover that one half value. Willey now denies that there was any express or implied settlement of the accounts between her and Renner. If there had been no such settlement, an action at law could not be maintained; if there had been such settlement, it is conceded that this action can be maintained. The question as to whether there had been such a settlement was not to be determined on the mere assertion of one of the parties. It was a mixed question of law and fact. The distinct question as to whether there had been a settlement was determined from all the circumstances at the trial below in favor of Renner. That finding is supported by sufficient evidence, and, having sufficient evidence to sustain it, it is not a reviewable question on appeal. It is the settled law in this territory that a finding of fact which is sustained by evidence will not be reviewed in this court. Although we may have reached a different conclusion on such evidence, it is not, for that reason, reviewable here.

[No. 609. September 1, 1896.]

J. E. SAINT, RECEIVER, PLAINTIFF IN ERROR, v. S. M. FOLSOM, DEFENDANT IN ERROR.

Affirmed on essentially same state of facts and for same reasons stated in Schofield v. Folsom, 7 N. M. 601.

ERROR, to the Second Judicial District Court, Bernalillo County. Affirmed.

W. S. CHILDERS for plaintiff in error.

F. W. CLANCY for defendant in error.

The facts in this case and the questions of law arising thereon are essentially the same as in the case of J. W. Schofield, receiver, v. S. M. Folsom, reported in 7 N. M. 601, and is controlled by it.

We being satisfied with the conclusion arrived at in that case, affirm this.

There being no error this case is affirmed, and it will accordingly be so ordered.

SMITH, C. J., LAUGHLIN, J., HAMILTON and BANTZ, JJ., concur.

[No. 573. September 4, 1896.]

UNITED STATES OF AMERICA, APPELLEES, v. STEPHEN M. FOLSOM, APPELLANT.

The defendant in this cause was convicted of a violation of the banking law, and appealed. The judgment was affirmed (7 N. M. 532), and a suspension of sentence was asked by the attorney general of the United States, which was denied. No opinion filed.

APPEAL, from the Second Judicial District Court, Bernalillo County. Suspension of sentence denied; HAMILTON, J., dissenting.

F. W. CLANCY and NEILL B. FIELD for appellant.

W. B. CHILDERS for United States.

HAMILTON, J. (dissenting).—I regret that I find it necessary, in obedience to my own convictions, to record my dissent to the conclusions reached by the

court in ordering the sentence to be executed in this cause. When the attorney general, some weeks ago, through the United States attorney, indicated his wish to have no steps taken, and expressed a desire that the execution of the sentence be suspended for the present, I was then impressed with the view that this desire of the attorney general should be respected, and that the execution of the sentence should not be enforced at this time. Subsequent reflection has confirmed me in the opinion I then had.

While it may be admitted that the judicial branch of the government possesses the absolute right to the exclusive control of the administration of all business distinctively within its department; that it has the power to regulate and control its proceedings, render and execute its judgments and decrees, so long as it acts within the limit of that constitutional and legislative authority by which it is created and controlled; and while it may be true that this right can not be taken away, limited, suspended, or controlled by any other department of the government, save by legislative authority, yet it is also true that conditions may arise, facts and circumstances may have occurred in the trial and conviction of a person charged with a crime under the laws of the United States, which make it not only legal and proper, but a matter of justice, that the court should give heed to the reasonable request of another department of the government as to the time and manner of enforcing the judgment and sentence under that trial. Especially is it so when we conclude that to grant this request no harm can come to the government, and to refuse the request injustice may be done to the citizen. The department of justice, through the attorney general and his subordinate officers, has the management, direction, and control of all the prosecutions arising under the laws of the United States. These officers investigate offenses, prepare indictments

in cases where they are required, manage and direct all trials on behalf of the government, and often discontinue or dismiss a prosecution which, in their judgment, ought not to be continued; and the court rarely, if ever, denies or disputes their right to do so. They being sworn officers of the court and of the government, and having the interest of the latter specially in charge, the court has a right to assume that they are guided in their course by a due regard for the proper administration of public justice. The defendant in this case was indicted, tried, and convicted in the Second judicial district court of this territory for a violation of the provisions of the laws relating to national banks. He brought the case to this court, where the judgment was affirmed. Feeling himself aggrieved by that decision, he sought to take his case to the appellate court for review, but the supreme court of the United States held that there was no existing law authorizing a review of the case, and it was sent back. Pending these proceedings, a bill was introduced, and is now pending in congress, which enlarges the jurisdiction of the circuit court of appeals of the United States so as to permit a review by that court of this class of cases. Pending this legislation the defendant has laid before the attorney general of the United States a copy of the record of his trial and conviction, and has petitioned for a suspension of his sentence until it is ascertained if the coming congress will adopt the legislation giving a right of review in the appellate court in this class of cases. The attorney general has investigated the case, and found, as I must conclude, sufficient merit in the appeal to request a suspension of the sentence, and he asks that no action be taken in the execution of the sentence at this time. It is our duty to respect this request, and delay the execution of the sentence, or ignore the request, and imprison the defendant, pending his possible right of appeal to a higher court. A

majority of the court have determined on the latter course; a conclusion to which I can not agree. If this request came from the defendant himself, it might not commend itself to my favorable consideration; but coming, as it does, from the side of the government whose interests are managed and controlled by the attorney general, through whose department this conviction was secured, he, after giving the matter investigation, and prompted, as I conceive, by a desire to see that justice is done alike to the government and the defendant, has made the request that no action be taken in the matter at this time; and I believe it to be due him, and but justice to the defendant, to yield to his request.

I was not a member of this court at the time of the trial, or at the time of the affirmance of the judgment by this court, and consequently, from the record, I know nothing as to the trial or the verdict. I may assume, however, that the trial was proper, and the verdict was correct; still I must also believe that the attorney general, after an investigation of the record of the conviction, has discovered therein sufficient merit in the appeal of the defendant to justify him in the conclusion that an opportunity should be given to the defendant to have the case reviewed by the appellate tribunal, and that a stay of sentence should be had until it is ascertained if this can be done. It may be said that the action of the attorney general in this regard is unusual. May it not also be true that upon an investigation of the case he has come to the conclusion that the government would suffer no injury by the delay, and that a due regard for the rights of the defendant has led him to the adoption of this course? Suppose the right of review should be given, and the appellate court should determine that there was error in the trial, and reverse the cause. Then the sentence now imposed by the court in that event would be both

improper and unjust to the defendant. On the other hand, if no review is allowed, or if, on such review, the case should be affirmed, then no harm or injustice is done to the government, so long as defendant is under good and sufficient bond to submit to the sentence which may be imposed upon him. If the trial at which he was convicted should prove to be erroneous, to impose the sentence now would, in my judgment, but force him to submit to an unjust imprisonment, based upon an erroneous trial, and thus visit upon him an unjust punishment founded upon an illegal verdict. I am fully persuaded that a due and proper administration of justice does not require us to execute a sentence and visit a punishment which may lead to such a possibility. I am constrained, therefore, in view of the desire expressed by the attorney general, to dissent from the action of the court in ordering the sentence executed upon the defendant at this time.

[No. 700. September 25, 1896.]

IN RE APPLICATION OF FRANCISCO GONZALES Y BORREGO, ANTONIO GONZALES Y BORREGO, LAURIANO ALARID, AND PATRICIO VALENCIA; HABEAS CORPUS.

HABEAS CORPUS—APPEAL.—An appeal will not lie from the supreme court of this territory to the supreme court of the United States in habeas corpus cases. Cross v. Burke, 146 U. S. 82; In re Lennon, 150 U. S. 393; In re Delgado, 140 U. S. 586, distinguished.

APPLICATION DENIED.

No briefs filed.

PER CURIAM.—In this case it is claimed that an appeal should be granted from this court discharging the writ of habeas corpus upon the return made thereto

by respondent, and remanding the petitioners, to the supreme court of the United States.

Counsel for petitioners base their claim for the allowance of an appeal upon two grounds: First, that an appeal is distinctly provided for by the act of 1874, embodied in section 1909 of the Revised Statutes, and by section 10 of the Organic Act for New Mexico; and, second, that it should be allowed under the act of congress of March 3, 1885, entitled "An act regulating appeals from the supreme court of the District of Columbia, and the supreme court of the several territories."

HABEAS CORPUS: appeal.

It must be conceded that, unless the portions of sections 1909 and 10, supra, relating to appeals and writs of error in habeas corpus proceedings are superseded or repealed by the act of March 3, 1885, the allowance of an appeal is mandatory in this character of case, but if said act governs us in this matter, we must then look to it to ascertain if an appeal lies.

We think that the reasoning in Cross v. Burke, 146 U. S. 82, is controlling on this question, and leads irresistibly to the conclusion that just as for the District of Columbia the act of March 3, 1885, covered the entire subject of appeals except as under section 5 of the act of 1891, for the establishment of circuit courts of appeal, so also it covers the entire subject of appeals from supreme courts of territories, the supreme court of the United States (the act of 1891 providing in no way for such appeals). All antecedent legislation, therefore, providing for appeals from territorial supreme courts we must consider superseded by the comprehensive plan created by the act of 1885.

And apt illustration as to how section 10 of our Organic Act, and section 1909, Revised Statutes, pass entirely from consideration as no longer existing legis-

lation is shown by the argument in the opinion by the chief justice in Cross v. Burke, supra, pointing out how section 764, Revised Statutes, no longer applies to the District of Columbia, because of the said act of March 3, 1885.

But it is urged that under said act of March 3, 1885, an appeal lies under the terms of section 2, because it is claimed that the justice who tried the cause, and who amended the record, while the same was on writ of error in this court, was acting without authority of law, while pretending to act under an authority of the United States, and that everything done by him was CORAM NON JUDICE.

It is unnecessary for us to say whether or not the application for the writ of habeas corpus distinctly draws in question such exercise of authority, as in our view even if it did, appeal would not lie in habeas corpus cases. Whatever might be our impression as to this, Cross v. Burke, supra, is again controlling on this question. We quote as sufficient on this subject from that opinion: "It is well settled that a proceeding in habeas corpus is a civil and not a criminal proceeding." Farnsworth v. Montana, 129 U. S. 104; Ex parte Fow Tong, 108 U. S. 556; Kurtz v. Moffitt, 115 U. S. 487. The application here was brought by petitioner to assert the civil right of personal liberty against the respondent, who is holding him in custody as a criminal, and the inquiry is into his right to liberty notwithstanding his condemnation.

In order to give this court jurisdiction under the act of March 3, 1885, last referred to, the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained. And as in this case the matter in dispute has no money value, the result is, no appeal lies. This reasoning is affirmed in In re Lennon, 150 U. S. 393.

It is to be said that territorial supreme courts occupy as to right of appeal in habeas corpus cases the same position that the supreme court of the District of Columbia occupied between March 3, 1885, and the passage of the act of 1891, referred to, the last named act affecting the District of Columbia, but not the territories.

The case In re Delgado, 140 U. S. 586, is called to our attention, as showing an appeal from this court in a habeas corpus proceeding, but it is to be remarked as to that case, that the point was not made as to there being no right of appeal from this court to the United States supreme court, and therefore it should not be considered an authority in the light of the cases of Cross v. Burke and In re Lennon, supra.

Wherefore it is considered that there being no authority of law to grant the appeal prayed for, it should be denied.

[No. 656. December 18, 1896.]

W. C. ROGERS ET AL., PLAINTIFFS IN ERROR, v. JOSEPH RICHARDS, DEFENDANT IN ERROR.

INSTRUCTIONS—APPEAL—ASSIGNMENT OF ERRORS—REVIEW.—This court will not review alleged errors in instructions, whether given by the court below of its own motion, or demanded, unless an exception is saved by motion for new trial.

ERROR, from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Affirmed.

The facts are stated in the opinion of the court.

CHARLES A. SPIESS for plaintiffs in error.

It was the duty of the court to instruct the jury as to the law of this case, and its failure to do so is sufficient ground for reversal. Comp. Laws 1884, sec. 2054.

Possession of personal property is prima facie evidence of ownership; and one who purchases such property for value of the general ownership in question, without notice that it is incumbered, will hold it discharged of any prior liens. Andrews v. Jenkins, 29 Wis. 476; McKnight v. Gordon, 13 Rich. Eq. 222; Button v. Bathbone, 118 N. Y. 666. See, also, Pingree on Mort., sec. 502; Williams v. Given, 6 Gratt. 268.

The general rule is that an adjudication takes effect only between the parties to the judgment, and it gives no right either to or against third parties. Chase v. Swan, 9 Cal. 136; Makey v. Coates, 70 Pa. St. 350; Rice v. Coolidge, 121 Mass. 393; Peters v. Spitzfaden, 24 La. 111; Samuels v. Agnew, 80 Ill. 550; Hill v. Stevenson, 63 Me. 364.

J. H. SUTHERLIN for defendant in error.

The instructions given by the court in this case fairly presented the law of the case, and if defendant was not satisfied and desired any particular point presented to the jury he should have offered additional instructions covering that point. Territory v. O'Donnell, 4 N. M. (Gil.) 196; U. S. v. De Amador, 6 Id. 174; Express Co. v. Kountz, 8 Wall. 342. See, also, Hobbs v. R. R., 66 Me. 572; Forguhor v. Dallas, 20 Tex. 200; 11 Am. & Eng. Ency. Law, 258.

Replevin will lie to regain property obtained by fraud. Cobb on Replev., sec. 244; 20 Am. and Eng. Ency. Law, 1048, and citations. See, also, Cobb on Replev., sec. 265; Acker v. Campbell, 23 Wend. 372; Neff v. Landis, 110 Pa. St. 204; Box, etc., Co. v. Lish, 119 Ind. 98; Benedict v. Williams, 48 Hun. 123; Mahoney v. Gano, 27 N. E. Rep. 315.

There was no motion for new trial made by plaintiffs in error in the court below, and consequently nothing before this court for review, except the instructions demanded by plaintiffs in error and refused

by the court. And these, in the absence of a motion for new trial, are only before the court by authority of section 2058, Compiled Laws, making them a part of the record in the case. Comm. v. Sellers, 37 Ga. 324; Lichty v. Clark, 10 Neb. 462; Laid v. State, 15 Tex. 317; Klatz v. Pertec, 101 Mo. 213; Alpers v. Schammell, 75 Cal. 590; Bowden v. Bowden, 75 Ill. 111; Grant v. Westfall, 5 Ind. 121; Jacobson v. Cornelius, 57 N. Y. Sup. 306.

Rulings and decisions arising in the course of the trial can not be assigned as error on appeal, but must be assigned as reasons for new trial, and are then brought up for review under the assignment of error because of the overruling of the motion for new trial. Louisville R. Co. v. Hart, 119 Ind. 273; Territory v. Anderson, 4 N. M. (Gil.) 213; Laird v. Upton, 8 N. M. 409; Grayson v. Lynch, U. S. Sup. Ct. Rep.

COLLIER, J.—This was an action of replevin begun in the district court of Santa Fe county by the defendant in error against the plaintiffs in error, resulting in a verdict for the plaintiff in the trial court being rendered on April 15, 1896. Notice of motion for new trial was given on the same day, but no motion being filed within five days after verdict, as required by rule of court, judgment was entered on the verdict, on motion of plaintiff, and a writ of restitution issued. Afterward a writ of error was sued out from this court, and said writ of restitution recalled.

The only errors assigned in this court are upon the instructions given by the court of its own motion, and the refusal of the court to give requested instructions. Defendant in error claims that, as to the error assigned upon the instructions which the court gave of its own motion, there is nothing for this court to review, in the absence of a motion for a new trial, and that, as to the requested instructions refused by the

court, they can be considered only for the reason that such instructions are made a part of the record proper, and that the instructions were rightly refused. Without giving our assent to the doctrine that refused instructions are in any different sense record from those given by the court of its own motion, we will consider the point raised by counsel as to a motion for new trial being necessary to secure review by this court of alleged errors in instructions.

INSTRUCTIONS: appeal: assignment of errors: review.

At this term of this court we have decided that, in order to have this court consider errors in instructions, it is required that exceptions should be taken at the time; the case of Territory v. Padilla, 8 N. M. 562, and Laird v. Upton, Id. 409, showing such ruling, and these decisions according with the uniform ruling of this court, beginning with the case of Leonardo v. Territory, 1 N. M. 291, of date July, 1859. These rulings embrace as well the case of the judge refusing requested instructions as giving instructions of his own motion. We find it unnecessary to go over this ground again, except to observe that our statute (section 2197) places the giving or refusing of instructions in the same condition, in regard to exception thereto, as any other "decision upon any matter of law arising during the progress of the trial." The established practice of this court—established both by statute and decision—being that errors in giving or refusing instructions, and errors in deciding matters of law arising upon a trial, stand upon exactly similar footing as to the necessity of exception, we will advert to decided cases in this court as to a motion for new trial being required to obtain a review of errors arising during the progress of a trial. In Spiegelberg v. Mink, 1 N. M. 308, it was held that, to entitle a party to a revision of the facts by this court, a motion for a new trial was necessary. The cases are almost uniform

upon the proposition that an appellate court will not consider an assignment of error to the effect that the verdict is against evidence, or is not supported by the evidence, unless there is a motion for new trial, and it is perhaps needless to append a list of authorities sustaining this view. The case of Sierra Co. v. Dona Ana Co., 5 N. M. 190, followed Spiegelberg v. Mink, supra; but in the same case the majority of the court considered an alleged error of law arising upon the trial, and BRINKER, J., concurred in the result upon the broad ground that, there being no motion for a new trial, there was nothing before this court to consider. In Territory v. Anderson, 4 N. M. (Gil.) 213, it was held that error in the exclusion of evidence must be pointed out in the motion for new trial, or the trial court need not, and the appellate court will not, consider such erroneous decision, though it be admitted that exception was duly taken. If the principle of that decision is sound, it would follow, logically, that, if there is no motion for a new trial at all, no error of law arising upon the exclusion of evidence will be considered in an appellate court. The only reason, having a semblance of plausibility, which would entitle errors in instructions given by the court of its own motion to be reviewed in the absence of a motion for new trial, conceding that errors in the exclusion of evidence are not entitled to such review, may be that instructions are contended to be record proper in the case, while errors in the exclusion of evidence only become record by means of a bill of exceptions. The record proper, in general, consists of the pleadings, process, verdict, and judgment. In Greene Co. v. Wilhite, 35 Mo. App. 43, it is said to include the original process, with the return thereon, the pleadings, order substituting parties, and the entry of final judgment; and in that case it is said that: "There may be difficulty in restricting the record proper, in all

cases, to the limits thus stated; but the largest view of what is deemed the record proper can make it include no more, in addition to what is above stated, than those orders which emanate from the breast of the judge while sitting in court, and which are evidenced only by the entries on the minutes of the court." A definition of "record proper" would seem to be: The pleadings, process, and return thereon; judgments upon pleadings; verdict; judgment; and all orders and rulings which should be entered upon the minutes of the court; but not motions to strike out pleadings, and orders thereon. The definition of a "bill of exceptions" serves also to show what should be considered record proper. "The bill of exceptions is a simple history of the case as tried, and should contain nothing more or less than the facts as they appeared to the court and jury from the commencement of the trial until the final judgment by the court." Gallaher v. State, 17 Fla. 379. "A bill of exceptions is a formal statement in writing of exceptions taken by a party in the trial to a ruling, decision, charge, or opinion of the trial judge, setting out the proceedings on the trial; the acts of the trial judge alleged to be erroneous; the objections and exceptions thereto, together with the grounds therefor,—and authenticated by the trial judge according to law." 3 Ency. Pl. and Prac. 378. If this definition further specified that the bill of exceptions should contain all evidence necessary to an understanding of the exceptions, it would be quite complete. "Motions made during the trial of a cause, and the rulings of the court thereon, must be preserved in a bill of exceptions." Id. 392, citing authorities. "The very general doctrine is that a motion for a new trial must be so preserved, unless by statute it is made a part of the record proper." Id. 400, citing authorities. "Unless a statute otherwise provides, a bill of exceptions is the sole mode by which

the instructions can be brought up to the appellate court for review." Id. 402, and authorities there cited.

From these authorities it appears that there can be no doubt that instructions are not a part of the record proper unless made so by statute. Does our statute so make them? We quote from our statutes as follows:

"Sec. 2055. All instructions asked and the charge of the court shall be in writing."

"Sec. 2057. The court must read to the jury all the instructions he intends to give and none others, and must write the word 'Given' or 'Refused,' as the case may be, in the margin of each instruction.

"Sec. 2058. All instructions demanded must be filed and shall become a part of the record."

"Sec. 2063. When the jury retires to consider its verdict, it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions."

As to instructions not demanded, there is nothing said about these becoming record, but they are required to be in writing. If they are given or refused (part of the record proper), that fact appears; but the mandatory terms of our statute require exceptions to secure review. They, therefore, come within the bill of exceptions as acts done by the judge in the trial of the cause, in the same way as rulings in excluding evidence; and following the decision of this court in Territory v. Anderson, supra, a motion for new trial is necessary to obtain a review of error alleged as to them in this court. We believe that the decision in Territory v. Anderson, supra, is sustained by the great weight of authority in this country; and, without citing abundant cases on this subject, we refer to Rindskoff v. Lyman, 16 Iowa, 260, where the question is

treated by DILLON, J., in the lucid and exhaustive manner with which that great jurist disposes of every subject he touches. The conclusion he arrives at in his opinion (citing authorities from numerous states) is "that it is generally held, that exceptions previously taken may be embodied in a motion for new trial, and in this manner preserved and brought before the appellate tribunal; but all rulings not excepted to, and all exceptions not embodied in the motion for a new trial, are by the appellate court deemed waived." The statutes of none of the states he cites, or which we have, in addition, examined, say, in terms, that a motion for new trial shall be made as a condition precedent to review in the appellate court, errors not appearing in the record proper; but they merely provide for new trials, and within what time after verdict they shall be made. Our statute (section 1842) and rules of court, having the force of statute law, provide the same thing.

This practice affords to the trial judge the opportunity of correcting errors that may have crept into the trial of a case because of the hurry and press of matters which came up for prompt decision, and which may, upon more elaborate argument,—counsel being surprised by a sudden emergency at the time of the trial,—be shown to be error meriting a new trial. Also, the appellate court may better weigh the discretion vested in a trial judge as to many matters, if, upon solemn argument, after the pressure of the trial has passed, a new trial is refused. These and other considerations carry with them great force, and the practice secures uniformity in procedure, and often lessens expense and delay, if the unsuccessful party shall be required to exhaust his remedy in the lower court.

Though counsel for defendant in error appears to concede that, as to the instructions refused, a motion for new trial was unnecessary, yet we do not think that section 2058, in prescribing that "demanded instruc-

tions must be filed and shall become a part of the record," means that they are a part of what is deemed record proper, but they belong to that part of the record embodied in the bill of exceptions, and that error assigned upon giving or refusing such instructions must be saved by a motion for a new trial. It would involve quite a contradictory appearance of things if the giving of erroneous instructions by the court of its own motion differed in any respect from the refusing of right, or the giving of wrong, instructions that were requested, especially when there would be no way of determining whether any instructions were right or wrong, generally speaking, unless there is a bill of exceptions showing the evidence in the case, and the instructions actually given. The provisions of law requiring instructions to be written, and demanded instructions to be filed, are merely directory, and intended to make the clerk of the court their custodian. When the statute says that the demanded instructions are a part of the record, it merely means that they are of the files in the case. Another statute requires the stenographer's notes to be deposited in the office of the clerk of the court, presumably, we may say, because they are a part of the case to which they refer; but it would be idle to call them, either before or after transcription, a part of the record of the case, in any strict sense, for they can not so become until embodied in a bill of exceptions; and neither, we think, do instructions, whether given by the court of its own motion, or demanded, until they come into a bill of exceptions duly settled. The case of Territory v. Anderson, supra, holds that, where an exception is not saved by motion for new trial, the lower court need not, and this court will not, review it; and we therefore find no matter of error here to be reviewed, and the case is accordingly affirmed.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

[No. 677. December 18, 1896.]

UNITED STATES OF AMERICA, APPELLEES, v. B. B. SPENCER, APPELLANT.

CRIMINAL LAW—MISCONDUCT OF JURY—IMPEACHMENT OF VERDICT—ONUS—NEW TRIAL.—Where a verdict of guilty in a criminal case was impeached by the affidavits of persons not jurors, showing that the jury were permitted by the bailiff to separate, visit saloons, and drink intoxicating liquors,—Held: That it was incumbent on the prosecution to show that defendant was not prejudiced by such misconduct on the part of the jury, and for failure to do so defendant was entitled to a new trial.

APPEAL, from the Second Judicial District Court, convicting defendant of unlawfully cutting timber on the public domain. Reversed and new trial granted.

The facts are stated in the opinion of the court.

A. L. MORRISON for appellant.

The court erred in not granting appellant a new trial because of the misconduct of certain of the jurors impaneled to try the cause. Thomp. & Merr. on Juries, sec. 378; Studley v. Hall, 22 Me. 198; Jones v. State, 13 Tex. 168; State v. Baldy, 17 Iowa, 39; Fairchild v. Snyder, 43 Id. 23; Davis v. State, 35 Ind. 496. See, also, People v. Douglass, 4 Cowen, 26; Lighton v. Sargent, 31 N. H. 130; Ryan v. Harrow, 27 Iowa, 494; State v. Parrant, 16 Minn. 176; Palmore v. State, 29 Ark. 248; Mattox v. U. S., 146 U. S. 140.

GEO. P. MONEY, assistant United States Attorney, for the United States.

The drinking of liquor by jurors during the progress of a trial is not error, unless it be made to appear that the defendant has been prejudiced thereby.

Wilson v. Abrahams, 1 Hill (N. Y.). See, also, Pratt v. State, 56 Ind. 181; Railroad v. Porter, 32 Ohio St. 331; Roman v. State, 41 Wis. 312; O'Neill v. R. R., 45 Iowa, 550; State v. Washburn, 91 Mo. 575; State v. Tatlow, 34 Kan. 80; Russell v. State, 53 Miss. 383; Commonwealth v. Roby, 12 Pick. 496; State v. Baber, 74 Mo. 294; Ins. Co. v. Kelly, 23 Pac. Rep. 1046; Sharpe v. Merriman, 66 N. W. Rep. (Mich.) 372; Gordon v. R'y, 29 S. W. Rep. (Ky.) 321; Sanitary Dist. v. Cullerton, 35 N. E. Rep. 724; Lumber Co. v. R. R., 10 S. Rep. (Miss.) 69; Vaughn v. Crites, 62 N. W. Rep. 1099; Carter v. Glass Co., 85 Ind. 180; State v. Livingston, 64 Iowa, 560; State v. Cucuel, 31 N. J. Law, 250; Jones v. People, 6 Colo. 459.

LAUGHLIN, J.—The appellant here and defendant in the court below was indicted on a charge of unlawfully cutting timber upon the public domain of the United States, and was on the ninth day of March, 1896, placed on trial; and on the eleventh day of March, 1896, the jury returned a verdict of guilty as charged, and after a motion for a new trial was made, argued, and denied, and a motion in arrest also being denied, the court sentenced the defendant to pay a fine of $300, and to serve a term of three months in the common jail of Bernalillo county, and the case is here on appeal from that judgment.

The record in this case discloses that the defendant was placed on trial, and the jury impaneled and sworn, and placed in custody of two bailiffs, on the ninth day of March, 1896; and that the trial continued until March 11, 1896, when the jury returned a verdict of guilty as charged. Among the grounds assigned in the motion for a new trial in the court below, and as errors for consideration by this court, are: Fifth. "Because said jury after being impaneled, sworn, and placed in the custody of two bailiffs to try the issues in the case,

were allowed to separate by said bailiffs, and, while so separated, drank spirituous liquors, before they returned to the jury room." Sixth. "Because said jurors, as aforesaid, were allowed to separate and visit a saloon, to wit, the saloon of Mrs. Muzio, located in Old Albuquerque, New Mexico." Eighth. "Because the sworn bailiffs permitted said jurors to separate and drink spirituous liquors, in disobedience of the strict and sworn instructions received from the court." Ninth. "Because said jury or jurors, while out and so separated, were allowed to talk to outsiders, in disobedience to the orders of this court, and to the prejudice of this defendant." The grounds in the motion were supported by affidavits of a number of persons, not jurors. The first affidavit is that of Panteleon Hill, who testified "that he was a street car driver at that time, and that at about 10 o'clock at night, March 9, 1896, one of the bailiffs, then in charge of the jury in this case, and two of the jurors, Cesario Grande and C. A. Hudson, boarded his car in front of Mrs. Muzio's saloon; that said Hudson at the time was drunk, and became noisy and quarrelsome and had a personal difficulty with the affiant, and with the bailiff who was then in charge of the two said jurors; that a number of other persons were there present in the street car." One Frank Di Luki made an affidavit that he was at that time the barkeeper at the said saloon of Mrs. Muzio, and that about 6 o'clock in the morning of March 10, 1896, said jurors C. A. Hudson and Cesario Grande and another member of said jury, Rafael Gabaldson, came to said saloon, called for whisky and drank it at the bar; and that said Grande purchased a bottle of whisky, put it in his pocket and carried it away with him. One Juan Baca y Salazar also made an affidavit that he saw Cesario Grande, Rafael Gabaldson, Juan Chaves y Trujillo, and said C. A. Hudson all at said saloon between 6 and 7 o'clock on the morn-

ing of said tenth day of March, drinking whisky, and that he saw both Grande and said Hudson each take a bottle of whisky away from said saloon, and that he knew all of said persons so named to be at that time members of the jury in this case. There are also affidavits of other persons supporting these facts, and it does not appear that any doubt exists as to the truthfulness of the facts set out in the affidavits. It further appears from the record that these affidavits were filed with the motion for a new trial, and that they are not traversed.

It is contended on the part of the appellee, in support of the verdict and judgment in the lower court, that, before the motion is available, it must appear that the separation or improper conduct of the jury resulted to the prejudice of the defendant. But this contention is not supported by the weight of authority. The general rule in criminal cases is that, where the verdict is assailed in the manner here shown, it is incumbent on the prosecution to repel the assault, and to show that no injury resulted to the defendant by reason of the alleged improper conduct on the part of the jury. Mattox v. U. S., 146 U. S. 149. The general rule is otherwise where the jurors attempt by affidavits to impeach their own verdicts. U. S. v. Reid, 12 How. 361; U. S. v. Biena, 8 N. M. 99. When the jury have been impaneled, sworn, and put in charge of bailiffs, it is vital that they should be excluded from all temptations from external influences which might in any manner tend to bias or prejudice their free and impartial deliberation. While it is a general proposition that the granting or refusing of a motion for a new trial is addressed to the sound discretion of the trial court, who is more capable to pass upon the equitable reasons assigned than the appellate court, purely from the reasons appearing in the record, yet there are exceptions to the general rule, and the case at bar

appears to be one of them. The court below received the affidavits, permitted them to be filed, and they are here in the record. That, manifestly, was the proper course for the lower court. But the record does not show that the court in any manner considered or passed upon the competency of the affidavits, but denied the motion for a new trial, and passed judgment and sentence on the defendant, and they are now here for consideration by this court as a part of the record, as to their competency. Mattox v. U. S., supra.

The affidavits, untraversed, establish a state of facts which cast suspicion on the regularity of the verdict, and it should not be permitted to stand. If the whisky in the bottles which the jurors Grande and Hudson carried from the saloon to their jury room was of the usual standard brand imposed upon the public, it is reasonable to presume that they were under its influence during that day, and while hearing testimony in the case; and, if this presumption is tenable, then two jurors were not in a frame of mind to dispassionately consider and coolly deliberate on the weight and the importance of the testimony. Their separation afforded opportunities for tampering and improper influences. The sacredness of trial by jury consists and rests in the conscientiousness of the jurors in applying the facts before them to the law as expounded by the court. But jurors whose minds are clouded by a too free indulgence of spirituous liquors, and their powers of conception blunted by its effects, are incompetent to appreciate the high responsibilities of their duties. "When the drinking of ardent spirits by a juror is attended with improper conduct, as where a juror separates from his fellows to drink in a barroom, or where ardent spirits are conveyed to him by one of the parties, a new trial will be granted." Thomp. & M. Jur., sec. 378; Studley v. Hall, 22 Me. 198; Jones v. State, 13 Tex. 168. In Fairchild v. Snyder, 43 Iowa, 23, a civil case, the

court said: "Where a juror becomes intoxicated on the evening of the day when the trial commenced, but it did not appear that he was intoxicated while in the discharge of his duties as a juror, held, that the court, in the exercise of its discretion, might properly grant a new trial for this reason." In Davis v. State, 35 Ind. 496, the court said: "In a criminal case, after the jury have been charged by the court, and put in care of a bailiff to consider on their verdict, the bailiff went with two of the jurors to a liquor and billiard saloon, where other persons were drinking and playing billiards, and procured for each of the jurors a drink of brandy, ginger, wine, nutmeg, and sugar, which they drank, and one of them paid for it, and it was not shown where the other jurors were at the time said two were absent with the bailiff at the saloon; and the transaction was unexplained, except that the bailiff asked the saloonkeeper, when he called for the drinks, if he could not fix something for the jurors' diarrhea. Held, that this was good cause for setting aside a verdict rendered by said jury against the defendant and granting him a new trial." The conduct of both jurors and bailiffs in this case shows a flagrant disregard of their sworn duties, and the court would have been justified in rewarding them with most severe punishment. If jurors should be permitted to separate, contrary to orders and instructions of the court, go to a barroom, drink intoxicating liquors, and converse and mingle with people generally, then the sacredness and respect for trial by jury would be destroyed, and the practice of excluding juries from outside and external influences and temptations for tampering and bribery is nullified, and no litigant would be protected in his constitutional right of a fair and impartial trial by a jury. The temptation to influence a verdict of a jury is great under all circumstances, and especially so in all criminal cases; and every opportunity to communicate in

any manner whatsoever with the jurors while they are hearing or considering a case should be excluded in so far as it is possible; and a verdict tainted with suspicion by improper conduct of a jury should not be permitted to stand. While it is true in the case at bar that the record does not disclose any prejudice to the defendant as a consequence of the separation and improper conduct charged against the bailiffs and some of the jurors, yet the facts show such a flagrant disregard of their duties that, were the verdict sustained, it might tend to establish a dangerous precedent, and one that might prove harmful to the administration of justice, and a due regard for the rights of trial by jury.

For the foregoing reasons, the judgment of the lower court is reversed, and the defendant is awarded a new trial; and it is so ordered.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

[No. 670. December 18, 1896.]

UNITED STATES TRUST COMPANY OF NEW YORK, COMPLAINANT, C. W. SMITH, RECEIVER, APPELLANTS, v. ATLANTIC & PACIFIC RAILROAD COMPANY, DEFENDANT; TERRITORY OF NEW MEXICO, INTERVENER.

CORPORATION, RAILROAD—GRANT OF PUBLIC LANDS—EXEMPTION—RIGHT OF TERRITORY TO TAX.—Where, by section 2 of an act of congress incorporating the defendant company, the right of way was granted through the public lands for the construction of a railroad and telegraph, to the extent of one hundred feet in width on each side of the road, "including all necessary grounds for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations," providing that "the right of way shall be exempt from taxation within the territories of the United States." HELD: that such grant conveyed to defendant company the title of the United States, to the lands used for the purposes named, absolutely, and the right of way within the meaning of the exemption clause included the roadbed, rails, and ties, station buildings, workshops, depots, machine shops, etc., which are not subject to taxation by the territory.

APPEAL, from an order of the Second Judicial District Court, Bernalillo County, requiring the receiver of defendant company to pay certain taxes. Reversed, BANTZ, J., dissenting.

The facts are stated in the opinion of the court.

C. N. STERRY and A. SNYDER for receiver, and EDWARD W. SHELDON and FREDERICK B. JENNINGS for United States Trust Company.

The act of congress creating the Atlantic & Pacific Railroad Company and authorizing it to build and operate a railroad from Springfield, Missouri, to the Pacific ocean, along the thirty-fifth parallel of latitude, was a valid exercise on the part of congress of powers granted by the constitution of the United States. California v. S. P. R. R., 127 U. S. 1; Luxton v. Bridge Co., 153 Id. 525; Railroad Co. v. Meyers, Id. 1.

By that act the Atlantic & Pacific Railroad Company became "an agent of the general government, designed to be employed and actually employed in the legitimate service of the government, both military and postal." A. & P. R. R. v. Peniston, 18 Wall. 5; Luxton v. Bridge Co., supra; California v. S. P. R. R., supra.

In the absence of express permission by congress, the territory of New Mexico has neither the power nor authority to tax either the franchise of the Atlantic & Pacific Railroad Company, or that portion of its railroad situated within the territory. California v. S. P. R. R., supra; Bank v. Dering, 91 U. S. 29; Latter Day Saints v. U. S., 136 Id. 3; Clayton v. People, 132 Id. 632; McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank, 9 Id. 738; Weston v. Charleston, 2 Pet. 466.

This grant of a "right of way" was a grant of an absolute fee in the land. Railroad Co. v. Roberts, 152

U. S. 114. See, also, Railroad Co. v. Baldwin, 103 U. S. 429; Bybee v. Railroad Co., 139 Id. 613; U. S. v. Telegraph Co., 50 Fed. Rep. 28; Railroad Co. v. Burr, 86 Cal. 279; Muscatine v. Railroad Co., 4 N. W. Rep. (Iowa) 909; Hazen v. Railroad Co., 3 Gray, 560; Railroad Co. v. Benity, 5 Sawy. 118; 2 Wood's R'y Law, p. 770; Robbins v. St. Paul, 22 Minn. 286; Railroad Co. v. Allen, 22 Kan. 285.

The superstructure became a part of the "right of way" when attached to it. Tied. Real Prop., sec. 3; 41 Am. and Eng. Ency. Law, 41; R. A. M. Co. v. I. G. H. Co., 24 Pac. Rep. (Cal.) 920; Kinsley v. McFarland, 19 Atl. Rep. (Me.) 442; K. I. M. Co. v. M. E. L. & P. Co., 12 S. W. Rep. (Tex.) 489; Rowland v. Anderson, 33 Kan. 264; Hunt v. B. S. I. Co., 98 Mass. 279; Pierce v. Emery, 32 N. H. 484; Haven v. Emery, Id. 68; Railroad v. Cowdrey, 11 Wall. 459; Potter v. P. B. S. Co., 122 U. S. 267; New Haven v. Railroad, 38 Conn. 452; People ex rel. v. Cassity, 46 N. Y. 48; People ex rel. v. Commissioners, 82 Id. 459; Milhau v. Sharp, 27 Id. 620; Santa Clara Co. v. Railroad, 118 U. S. 394; Chicago v. Baer, 41 Ill. 305; McCrea v. C. N. B., 66 N. Y. 489; Water Co. v. Frenchtown, 57 N. W. Rep. (Mich.) 268; Paris v. Water Co., 27 Atl. Rep. (Me.) 146; Water Co. v. Board, etc., 51 N. W. Rep. (Iowa) 18.

As to the question of exemption in an exactly similar section in the grant to the Northern Pacific Railroad, see Railroad v. Garland, 3 Pac. Rep. 134; Navigation Co. v. Berkes Co., 11 Pa. St. 202; Railroad v. Berkes Co., 6 Id. 70; Railroad v. Crawford Co., 48 Wis. 666; Osborne v. Railroad Co., 40 Conn. 491; Railroad v. Commissioners, 84 N. C. 504; Worcester v. Railroad Co., 4 Metc. (Mass.) 564; Railroad Co. v. Berks, 2 Am. R'y Cas. 306; State v. Railroad Co., 35 N. J. Law, 537; U. S. v. Railroad Co., 150 U. S. 1.

JOHN P. VICTORY, solicitor general, for the territory.

The territory has power to tax the property of the Atlantic & Pacific Railroad Company. Organic Act, sec. 7; Rev. Stat. U. S., sec. 1851. See, also, Ins. Co. v. Canter, 1 Pet. 543, 546; 1 Fed. Cas. 660; Dred Scott v. Sandford, 19 How. 444, et seq.; Clinton v. Englebrecht, 13 Wall. 441; Hornbuckle v. Toombs, 18 Id. 655, 656.

The right of way is a mere easement, and the grant of a right of way does not carry the fee to the land. Cooley's Const. Lim. 60; Suth. Stat. Con., secs. 247, 346; Williams v. R'y Co., 50 Wis. 76; Railroad Co. v. McWilliams, 71 Iowa, 164; Kellogg v. Malin, 50 Mo. 499, 500; Railroad Co. v. Lesuer, 19 Pac. Rep. 157; Lyon v. McDonald, 78 Tex. 71; Lumby v. Railway Co., 23 Vt. 387; Railroad Co. v. Swivney, 38 Iowa, 182; Railway Co. v. Roberts, 152 U. S. 114, at 122; Trust Co. v. Railway Co., 63 Fed. Rep. 913.

The exemption of the right of way from taxation does not exempt the improvements thereon. People v. Casity, 46 N. Y. 48, 50; People v. Commissioners, 82 N. Y. 462, 463; San Francisco v. McGinn, 67 Cal. 110; People v. Shearer, 30 Id. 656; Crocker v. Donovan, 30 Pac. Rep. 377; Turney v. Saunders, 4 Scam. 527; Waller v. Hughes, 11 Pac. Rep. 122; Gold Hill v. Caledonia Co., 5 Sawy. 575.

Exemptions from taxation is the exception, and all exceptions are to be strictly construed. Railroad Co. v. Atlanta, 66 Ga. 107; 2 Cooley on Tax. 209; 1 Desty on Tax. 79; Delaware Railroad Tax Case, 18 Wall. 206; Railroad Co. v. Gaines, 97 U. S. 708; Tucker v. Ferguson, 22 Wall. 575; Hoge v. Railroad Co., 99 U. S. 355; Railroad Co. v. Sherman, 132 Id. 174; Railroad Co. v. Guffey, 120 Id. 575; Railroad Co. v. Maguire, 20 Wall. 61; Railroad Co. v. Wright, 116 U. S. 231; Rail-

road Co. v. Reid, 13 Wall. 266; Bank v. Billings, 4 Pet. 514; Railroad Co. v. Maryland, 10 How. 376; Railroad Co. v. Dennis, 116 U. S. 667–669; Banks v. Tennessee, 104 Id. 496, 497; Railroad Co. v. Thomas, 132 Id. 185; Schurz v. Cook, 148 Id. 409; Railroad Co. v. Alsbrook, 146 Id. 294; Land Co. v. Minnesota, 159 Id. 529.

SMITH, C. J.—This is an appeal from the order of the district court of Bernalillo county, sitting as a court for the hearing and trial of causes arising under the constitution and laws of the United States, taken by the receiver (appointed by it) of the property of the Atlantic & Pacific Railroad Company, and by the United States Trust Company, complainant in that action. The order required the receiver to pay to the treasurer of Bernalillo county taxes aggregating the sum of $43,254.70, which were levied upon property placed upon the assessment roll in the year 1895 by the assessor, as property omitted by the railroad company to be returned for the year 1893, as property omitted to be returned for the year 1894, and as property omitted to be returned for the year 1895, with twenty-five per cent penalty added for the year 1895. The separate amounts of this aggregate being $13,978 for 1893, $12,768.78 for the year 1894, and $16,585.14 for the year 1895. The Atlantic & Pacific Railroad Company was incorporated by the act of congress of the United States approved July 27, 1866. Among the provisions contained in its charter was one authorizing the company to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific ocean, practically along the thirty-fifth parallel of latitude, and granting to it, in the second section, a right of way through the public lands, two hundred feet in width, with sufficient grounds for station buildings,

workshops, depots, machine shops, switches, side-tracks, turntables, and water stations; also, the power to acquire a right of way and station grounds of the same character through private lands, by condemnation proceedings provided for in the act. The second section of the act exempted from taxation within the territories of the United States the right of way. The sections referred to, and others of the charter, are hereafter, in the brief, set out in full. The Atlantic & Pacific Railroad Company afterward constructed its line of road from Isletta Junction, fifteen miles west of Albuquerque, to the Colorado river, and maintained and operated the same to such point, and beyond, from the year 1882 up to the present time, except that in January, 1894, receivers were appointed, in foreclosure proceedings commenced in the Second judicial district court of the territory of New Mexico, for the property of the Atlantic & Pacific Railroad Company; and such receivers took possession of and operated said railroad up to February 1, 1896, when, in another foreclosure proceeding, and in the same one, the present receiver, C. W. Smith, was appointed receiver of the property of the Atlantic & Pacific Railroad Company in New Mexico, Arizona, and California. In the year 1893 the railroad company returned for assessment to the assessor of Bernalillo county property of the value of $530,960 and for the year of 1894 the receivers returned property to the same value, and for the year 1895 the receivers returned property to the same value. During none of these years was the right of way, station grounds, or superstructures thereon returned for taxation by the company or by the receivers, as each claimed that the same were exempt from taxation. In the year 1895 the assessor for Bernalillo county, under the instructions of the board of county commissioners, assessed as personal property (describing the same as such) the entire superstruc-

tures of the railroad on its right of way and station grounds in Bernalillo county, although each and every part of the property so described and assessed was attached to, and a part of, the right of way and station grounds of the railroad company. A tax was levied upon each of these assessments, and subsequently, in March, 1896, the territory, upon permission of the court, filed in the foreclosure case of the United States Trust Company an intervening petition to recover such taxes. (Printed T. R., pp. 56 to 57.) An order to show cause why the intervening petition should not be granted was properly served upon the parties to the foreclosure suit, and subsequently the United States Trust Company, the complainant in the foreclosure suit, and C. W. Smith, the receiver appointed in such suit, filed answers showing cause why the intervening petition should not be granted. (Printed T. R., pp. 78 to 89.) Subsequently an agreed statement of facts was made between the parties, and the cause submitted and heard upon such agreed statement of facts. (See Printed T. R., pp. 90 to 96.) Subsequently the court found that these assessments were valid, and ordered the receiver to pay out of the property and funds in his hands the sum of $43,254.70 (Printed T. R., pp. 97 to 105 inclusive) to the treasurer of the county. A stipulation was made between the parties, in which the territory entered its appearance herein, and in which it was agreed as to the parts of the record which should constitute a transcript in this case. (Printed T. R., pp. 4 to 5 inclusive.)

Assignments of errors: First. That the court below erred in holding that the additional assessment of $539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1893 as property omitted for that year, and placed upon the assessment roll of the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895 was and is a

valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court. Second. That the court below erred in holding that the additional assessment of $539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1894 as property omitted for that year, and placed upon the assessment roll for the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court. Third. That the court below erred in holding that the additional assessment of $539,950 together with the twenty-five per cent penalty added to such amount, levied and assessed by the assessor of the county of Bernalillo as property omitted to be returned for the year 1895, was and is a valid assessment, and that the taxes levied thereon for the said year 1895 are a valid lien upon the property and franchises of the said railroad company now in the custody and control of the court. Fourth. The court below erred in holding and decreeing that the receiver should pay to the treasurer of the county of Bernalillo the sum of $43,254.70, as taxes due from the Atlantic & Pacific Railroad Company, and the receiver thereof, for the years 1893, 1894, and 1895, upon the property placed upon the assessment roll by the assessor of Bernalillo county as omitted property, and erred as to the amount ordered to be paid as taxes for each of said years.

It has been adjudicated by the court of last resort (Railroad Co. v. Peniston, 18 Wall. 5) "that the state can impose a tax upon the property of corporations chartered by congress as agents to subserve the lawful purposes of the government. Provided that such tax does not deprive such organizations of the power to serve the government as they were intended to serve

it, it does not hinder the efficient exercise of their power." It is difficult to appreciate that the legality of a tax must be determined by its effect,—that its constitutionality is contingent upon its operation; and it is suggested that, if such consideration is decisive, the issue is not one of right, but of feasibility. The same case affirms the distinction before made by said tribunal between the franchise and property of such corporations, pronouncing the one exempt from taxation by the states, and the other liable to assessment, upon the ground that the one is upon the operation of said corporation, and the other upon their possessions, —their property; it being represented that existence in the one case is involved, but in the other efficiency only. If the tax is right or wrong, legal or unauthorized, according to its effect, it would seem that it can be placed upon the franchise as well as upon the property, providing that it should not deprive the corporation of the power to fulfill the purposes for which they were created by congress. Banks are not rendered inefficient or failures by a tax upon the right to do business, nor are railroads forced into liquidation by the exactions of the states whose area they traverse. However, res adjudicata by the supreme court of the United States constitutes the law; and it is now established, as the attribute of the nominal sovereignty of states, that they are supreme in their power of taxation upon the property within their jurisdiction with the qualification,—however, that they can not so exercise this power as to arrest or impair the operations of the general government. But it is yet to be determined whether the territories are equally absolute in their domain. Territorial governments are the anomalous creatures of the congress of the United States,—conceived, presumably, from the necessity of conditions. They possess neither sovereignty nor prerogative, but enjoy, by the grace of congress, privi-

leges specifically enumerated in the charter of their existence. It can not be conceived that congress, in any contingency, contemplated that the territories should assume powers which it surrendered in the interest of the public, or interfere with its policy for the country's comfort and safety. It would not be legitimate for congress to confer franchises accompanied with inducements to procure their acceptance, and to promote their operations, and, having received the desired and expected benefits, to repudiate the favors granted; and it would seem that to allow the territories to ignore its guaranty would be not less culpable than to do it itself.

Section 20 of the act incorporating the Atlantic & Pacific Railroad Company declares the object of the act to be to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes. Congress deemed it paramount for the country to be so connected with its exposed western coast, that it would be protected in the event of hostilities, and, recognizing the probability of antagonism of interest between the sections, remote from each other, and without the facility of communication, incorporated the Atlantic & Pacific Railroad Company to construct a railroad and telegraph line, and to promote the accomplishment of said object, bestowed privileges upon said company, in the interest and welfare of the public, and to secure to the government at all times, the use and benefit of such road for postal, military, and other purposes. Section 2 of said act of incorporation is as follows: "And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company, its successors and assigns,

for the construction of a railroad and telegraph as proposed. * * * Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States." Section 3 of said act grants "to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches," alternate sections of the public lands.

It is manifest that congress appreciated the magnitude of the enterprise proposed, and recognized that the expenditure and difficulties involved would not be encountered except for substantial advantages that might eventually be profitably utilized. It bestowed franchises that contained privileges, and yet so connected with burdens that it recognized that one would not be available unless there was partial relief from the other by exemption from taxation and the donation of land. The right of way was granted, and its exemption from taxation within the territories of the United States declared. . It must be recognized that congress acted in good faith, and intended to contribute material, not nominal, assistance to the company, for the construction of the railroad and telegraph line for the convenience of the government at all times, and in the interest and welfare of the public. The alternate sections were granted to aid—it may be said to secure—the construction of said railroad for the safe and speedy transportation of the mails, troops, munitions of war,

and public stores over the route of the said line of railway, and doubtless the right of way exempt from taxation was conceded to encourage the company to embark in the hazardous experiment. Congress, presumably being cognizant of the character of the country along the thirty-fifth parallel of latitude, can not be suspected, in giving a right of way, to have intended to convey valueless, barren land only, as such consideration would neither encourage nor aid in the construction of the railroad. Congress, in announcing the object of the act of incorporation, distinctly discloses that it regarded the construction of a railroad between the proposed termini a necessity so imperative that it reserved the right to make any alterations or amendments to the act to promote the accomplishment of its object, or to repeal it altogether should it prove an obstacle to the construction of the said road. And it is logical, indeed inevitable, that the concessions of the company should be construed with a view to carry out the congressional conception. The right of way granted is practically nothing, if merely the one hundred feet on either side of the roadway, and it is plain that such restriction would be in contravention of the spirit that actuated congress in granting the franchise; and it may be that, if such construction had been apprehended, the franchise would have been neither sought nor accepted. Congress proposed the construction of the railroad for the lawful purposes of the government, and for the interest and welfare of the public, and tendered the inducements it deemed sufficient to secure it,—not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to a roadbed; not the right to a roadbed only, but to a roadbed equipped with ties and rails to constitute a railway over which cars should be conducted for the lawful purposes of the government; not only the right to a roadbed so furnished, but to a railroad provided

with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created. If such was the purpose of congress, it should be deferred to by the territories, and no attempt inconsistent with it is legitimate. Congress, having secured for the country a valuable connection in the system, uniting the two oceans, recognized that it has received full consideration for the privileges conferred, and has not attempted to impair them; and it seems that the territories, having received incalculable advantages from the construction of the railroad through an area that appeared irredeemable, rendering it practicable for occupation, and creating opportunities for the development of its resources, should not only forbear the effort to impose burdens upon it, but should foster it by generosity in the recognition of its rights and in the bestowment of favors. The intention of congress should be broadly recognized, and its spirit graciously respected. We have indulged in these observations as suggestive of the considerations which should be potential in the construction of the act in question, and we will now apply them.

It does not appear material whether the grant of the right of way created a fee or an easement, as in either event the exemption from taxation attaches. It is difficult, however, to conceive any reason for the contention that the grant by congress of a right of way for the construction of a railroad does not operate commensurately with all other grants from the government. Grants of land by congress to aid in the construction of a railroad surrender the title of the government, and the lands do not revert, after condition broken, until forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of the law for that purpose, or through some legislation equivalent to a judgment of office found at common law. Railway Co. v. McGee,

115 U. S. 469–473. It will be deemed, it is to be presumed, that the right of way was granted to the Atlantic & Pacific corporation to aid in the construction of a railroad, and it can not be legitimately contended that the lands so conveyed could revert to the government upon condition broken, except through proceedings instituted by the government. The United States can only enforce forfeiture of its lands granted, and the title to the right of way must consequently remain in the grantees until the grantor resumes it on account of the grantee's failure to earn it. No individual can assail the title of the government, as conveyed, on the ground that the grantee has failed to perform the conditions annexed. 21 Wall. 44. Railroad Co. v. Baldwin, 103 U. S. 430, contains the following: "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route." In Bybee v. Railroad Co., 139 U. S. 679, it is declared that the distinction between a right of way over the public lands and lands granted in aid of the construction of the road is important in this connection. As to the latter, the rights of settlers and others who acquire lands by purchase or occupation between the passage of the act and the actual location and identification of the lands are preserved unimpaired, while the grant of the right of way is subject to no such condition. It will be observed that these decisions establish that a grant of a right of way is, if anything, more absolute, and of a greater degree, than the grants of alternate sections of land. The supreme

court of the United States, in Railroad Co. v. Baldwin, 103 U. S. 429, has declared that acts similar to that under consideration are a present grant, and import a transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act. It says: "The grant of the right of way by the sixth section contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the government with respect to the public land which would call for any qualification of the terms. Those lands would not be the less valuable for settlement, by a road running through them. On the contrary, their value would be greatly enhanced thereby." Says the court in the opinion above referred to (139 U. S. 674): "The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by congress in aid of the construction of roads in different parts of the west, which have been considered by this court as taking effect in praesenti, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with the secretary of the interior." In Railway Co. v. Roberts, 152 U. S. 116, it is announced, not as obiter dictum, but as the court's conclusion upon an issue involved, that the right of way granted by congress to the Missouri, Kansas & Texas Railway through lands reserved for the use and occupation of the Osage Indians vested the title to the lands appropriated for said way, to wit, two hundred feet in width, in said company, either upon the passage of the act, or the construction of the road. The supreme court of Oklahoma on September 10, 1896, decided as follows in the case of Churchill v. Railway Co.: "An act of congress in-

vesting and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using, and maintaining a railway through and over public land, and providing that said company is authorized to take and use, for all purposes of a railroad, a right of way over said public land, is a present, absolute grant."

We can but accept these authorities as conclusive as to the effect of a grant of a right of way by congress to aid in the construction of a railroad through the the public domain. That the title of the government to the lands granted to the company passes absolutely to the company, we must regard as adjudicated, and we will now address ourselves to the consideration of the elements that compose a right of way as intended by congress.

The general rule is that fixtures once annexed to the freehold become part of the realty, where the intention is clear that they should be permanently connected with it. It will not be contended that the ties and rails were temporarily affixed to the roadbed, or that they could be removed without material injury to the freehold. Being annexed to the roadbed for continuous use, and the roadbed being valueless without them, they become as much a part of the right of way as the roadbed. Attached to the roadbed, they are absolutely subject to the mortgages on the road at the time of their attachment, and foreclosure involves them no less than the roadbed. Says the supreme court of the United States in Porter v. Steel Co., 122 U. S. 267, 283: "Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company containing stipulations" that the title to the property shall not pass until the property is paid for, and reserv-

ing to the vendor the right of removing the property. In U. S. v. New Orleans R. R., 12 Wall. 362, it is stated that, if the company give a mortgage for the purchase money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgages. This rule, however, fails when the property purchased is annexed to a subject already covered by the general mortgage, and becomes part thereof, as when iron rails are laid down and become part of the railroad. In the case of U. S. v. Denver & R. G. R'y Co., 150 U. S. 12, it is declared that all necessary appurtenances of all railroads may fairly be regarded as parts or portions of the railroad whose construction it was the purpose of congress to aid. In its ordinary acceptation, and large sense, the term "railroad" fairly includes all structures which are necessary and essential to its operation. As already stated, it was not the intention of congress to aid in the mere construction of the roadbed or the roadway, but to aid in the construction of the "railroad," as such, which term has a far more extended signification than the mere "track" or "roadway." If the language of the act had shown an intention merely to aid in the construction of the roadbed or the roadway, it is clear that such structures as station houses, etc., would not have been included, etc.

It is true that the exemption from taxation by a state is construed with strictness in favor of the state, but it will be observed that this discrimination exists where the exemption is the act of the state as to the property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in a territory belonging to the United States. The Atlantic & Pacific corporation has received no grant from the territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other. And it is

not, we conceive, legitimate, in arriving at the rights of the territory in the premises, to consider it as though it had created a factor, and was exacting tribute for its favor. The United States presents no problem, asserts no claim; having, by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Were the controversy between the government and the company, the grant should, in the language of the supreme court (150 U. S. 14), receive a liberal construction in favor of the purposes for which it was enacted; and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory, to settle their respective rights. The company derives its rights from congress, and they should be ascertained and determined by rules that will evolve the intention of congress, and not by principles in the interest of a local government. In Railroad Co. v. Barney, 113 U. S. 618, 625, Mr. Justice FIELD, speaking for the court, says that acts making grants ought to receive such a construction as will carry out the intention of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look for the condition of the country when the acts were passed, as well as the purposes declared on their face, and read all parts of them together. Mr. Justice JACKSON, in U. S. v. Denver & R. G. R'y Co., 150 U. S. 14, in quoting the above rule as announced by Mr. Justice Field, says: "Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act operating as a general law, and manifesting clearly an intention of congress to secure public advantages, or to subserve the public interest and welfare, by means of benefits

more or less valuable, offers to individuals or to corporations, as an inducement to undertake and accomplish great and expensive enterprises, or works of a quasi public character, in or through the immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction, in favor of the purpose for which it was enacted." In Railroad Co. v. Garland, 3 Pac. Rep. (Mont.) 144, Chief Justice WADE, after citing certain authorities, concludes: "It follows from these propositions that the roadbed, the rails fastened to it, station buildings, workshops, depots, machine shops, etc., constructed over, upon, and through the right of way granted to the plaintiffs, and attached to the soil, and annexed to the easement, become a part of the real estate of the railroad company." Again quoting from the opinion in the case of Railroad Co. v. Garland, supra: "It is a general rule that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object. 'It is a well known and reasonable rule, in construing a grant, that, when anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also.' SHAW, C. J., in Babcock v. Railroad Corp., 9 Metc. (Mass.) 555. Here is a grant of a right of way through the public lands 'for the construction of a railroad and telegraph.' Such a grant carries with it the right to the exclusive possession of the lands described for the purpose aforesaid; to make excavations, cuts, and fills in the soil or ground; to construct a roadbed of suitable width and grade; to lay ties and rails thereon; and to erect upon the lands described as, and included in, the right of way, all buildings, shops, water sta-

tions, depots, etc., necessary and suitable to be used in constructing or operating such railroad. This right necessarily implies property in the ground itself. This property is real estate, and the title to it is a legislative grant. By virtue of this grant the railroad company acquired the same interest in the land as if it had received a deed of the land for the purpose of constructing and operating a railroad. The provision contained in section 2 of the act incorporating plaintiff, declaring that 'the right of way shall be exempt from taxation within the territories of the United States,' therefore carries with it, and exempts from taxation within the territories, the roadbed, the ties and rails thereto attached, and all the station buildings, workshops, etc., necessary for the construction and operating said railroad; and the assessment for taxation and levy for tax thereon of 'twenty miles of railroad' in the county of Custer, as mentioned and described in the complaint, which description must include the roadbed, ties and rails, and all necessary buildings attached to the soil and annexed to the easement of the right of way, was unauthorized, and is illegal and void."

We deem the foregoing principles and authorities sufficient to exclude doubt as to the intention of congress in granting a right of way, and exempting it from taxation within the territories of the United States. And, further, it appears that the second section of the act incorporating the Atlantic & Pacific Railroad Company expressly includes in the right of way all necessary grounds for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations. The second clause of said section reads as follows: "Said way is granted to said railroad company to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots,

machine shops, switches, sidetracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the United States." It is plain that said clause must be construed with reference to its context, and that by such rule, it seems, "said way" is identical with the right of way referred to in the preceding clause, and that the exemption accorded by the succeeding clause includes and extends to the necessary grounds for station buildings, etc. The land being, in its virgin state, distinctly exempt; the roadbed being the land so converted; and the appurtenances,—rails and ties, station buildings, workshops, depots, machine shops, necessary for the construction and operation of the railroad, becoming, by annexation, a part of the realty,—it is inevitable that the aggregate land, roadbed, rails and ties, and said appurtenances, constitute the right of way contemplated by congress. A less consideration could have been no inducement to the company to accept the franchise, and that it should now be deprived of this advantage, distinctly conferred by the supreme authority creating it, by a subordinate, dependent body, deriving its existence from the power that created both, would be unjust, if not iniquitous. The Atlantic & Pacific corporation, within the limits of the act creating it, is as complete and independent as the territory of New Mexico under its organic act. Both are creatures emanating from the same source, and it can not be that the latter can impair the rights of the former.

In conclusion, it must be recognized that it is incumbent upon the court to be controlled by the manifest purpose of congress in conferring the franchise upon the Atlantic & Pacific Railroad Company, and as it is palpable that the intention was to contribute substantial aid, promotive of the construction of a railroad by such company, we are constrained to the conclusion that the exemption accorded must be con-

strued to include the fixtures essential to the establishment and operation of the road. The rails and ties are not more a part of the realty exempt than are the structures attached as station houses, etc., and the one is not more indispensable to the completion of the road than are the others to its utilization for the accommodation of the government. We are, therefore, of the opinion that the right of way, including roadbed, ties and rails, station buildings, workshops, depots, machine shops, etc., is not liable to taxation in the county of Bernalillo, territory of New Mexico, and the decree of the lower court is accordingly reversed.

LAUGHLIN and HAMILTON, JJ., concur.

BANTZ, J. (dissenting).—I can not agree with my associates in the conclusion reached in this case. The inquiry is not as to what has been granted, but is as to what has been exempted from taxation. The grant is the right of way, including necessary grounds for station houses, shops, depots, etc. It is not material whether that grant conveyed the ownership of the soil, or only an easement. It is not everything which the grantee erected thereon or affixed thereto which is exempt, but the thing exempt is the right of way. While it may be that this exemption is broad enough to extend beyond the mere ownership or use of the soil, and may cover such improvements as the roadbed, ties, rails, culverts, and bridges, which are affixed to the right of way, and necessary to the use of it as such,—a proposition by no means clear—I am of the opinion that the exemption does not cover other improvements not essential to the use of the right of way, however convenient and necessary such improvements may be to the orderly and economical conduct of the company's business. Nor do I believe that such exemption extends to the additional grounds for station houses, depots, workshops, etc., or to such

improvements thereon. Portland S. & P. R. Co. v. Saco, 60 Me. 196; People v. Commissioners of Taxes, 82 N. Y. 459. If the exemption of a right of way can cover station houses, workshops, and depots, there is nothing to prevent a like exempting from extending to dwelling houses for lodging employees, or hotels for entertaining patrons, when erected on the right of way. If the exemption extends so far, it must comprehend something more than the right of way, and something by implication, and liberal implication at that. Some stress has been laid upon the point that the additional grounds for station houses, shops, etc., are a part of the right of way. But in my opinion this is not well founded. The act does not make the additional grounds a part of the right of way, but the act grants the right, "including" all necessary ground for station houses, etc. Grounds additional to the right of way are included in the grant, but, when we look into the clause exempting from taxation, we find it does not extend to all the property granted, but only, and in terms, to the "right of way." It has been settled by a long line of decisions, from U. S. v. Arredondo, 8 Pet. 738, and the Charles River Bridge Case, 14 Pet. 420, that grants from the sovereign are to be construed strictly against the grantee, who takes nothing by implication, or which is not manifestly intended by the clear terms of the grant; and this rule applies as well in favor of third persons as it does in favor of the power making the grant. This rule is applied for a stronger reason, and with greater strictness, when the grant involves a surrender of one of the great powers essential to government, like that of taxation. U. S. v. Denver & R. G. R'y Co., 150 U. S. 1. In a recent case the supreme court of the United States say: "The taxing power is essential to the existence of government, and can not be held to have been relinquished in any instance unless the deliberate pur-

pose of the state to that effect clearly appears. The surrender of a power so vital can not be left to inference or conceded, in the presence of doubt; and, when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power." Railroad Co. v. Alsbrook, 146 U. S. 279. It does not matter whether the grant which is to operate as a relinquishment of the power of taxation is one made by a state legislature, or by congress; its terms are subject to the same rule of interpretation. And, unless congress has exempted this property from taxation, the territorial legislature has the same power to tax it which it has to tax like property of other owners. Reading the act creating this exemption in the light of established judicial decisions, I am of the opinion that the exemption does not extend to the additional grounds for station houses, depots, shops, etc., nor to improvements thereon, nor to telegraph lines and poles on such right of way.

[No. 606. On Rehearing, December 19, 1896.]

FRANCIS X. EBERLE, PLAINTIFF IN ERROR, v. WILLIAM CARMICHAEL ET AL., DEFENDANTS IN ERROR.

MINES AND MINING—LOCATION—ORAL AGREEMENT—STATUTE OF FRAUDS.—Where each of three persons located a different mine, under a parol agreement that all mines located by either should be owned in common by them.—Held: That such agreement was not within the statute of frauds.

ON REHEARING. Denied; LAUGHLIN and BANTZ, JJ., dissenting.

THOMAS B. CATRON for plaintiff in error.

No ground for rehearing is set up which did not constitute subject-matter of the decision of the court in

this cause reported in 8 N. M. 169. Rehearings will not be granted on such a showing. Mount v. Mitchell, 32 N. Y. 702; Fosdick's Exor. v. Hempstead, 126 Id. 651; 56 Id. 94; 8 Minn. 540. See, also, Teaz v. Corystie, 2 Abb. Prac. 260; Brown v. Aspden, 14 How. 25; U. S. v. Knight, 1 Black, 489; Walker v. Ryan, 9 Wall. 603; 102 U. S. 107; 104 Id. 415; 6 Sawy. 530; 89 Cal. 25.

W. B. CHILDERS for defendants in error.

The position of the court rendered in this cause that the requirement of the territorial statutes with reference to the recording of locations of mining claims is in conflict with the provisions of section 2324, Revised Statutes, United States, with reference to work done on only one claim for the benefit of that and contiguous claims held in common, is not well taken. Jupiter Min. Co. v. Bodie Min. Co., 7 Sawy. 96 (4 Marr. 426).

The contention that a mere possession under a parol agreement constitutes a holding in common, is a complete begging of the question. Carpentier v. Montgomery, 13 Wall. 480; Morehouse v. Phelps, 21 How. 294; Shelburn v. DeCordova, 24 How. 423; Fenn v. Holme, 21 How. 481; Gilmer v. Pointdexter, 10 Id. 257.

The civil law has nothing whatever to do with the provisions of our statute relating to instruments under seal. At the time section 2752, Compiled Laws, was enacted the common law was in force in this territory. Childers v. Talbott, 4 N. M. (Gil.) 336; Browning v. Browning, 3 Id. 659.

The contention that the defendants having failed to put a location notice in evidence, they must be treated as mere trespassers, is also not sustained. The plaintiffs would have to show actual possession or the right to the immediate possession growing out of a valid location notice as against defendants. Until this is

done the defendant is not required to show any title. Reynolds v. Mining Co., 116 U. S. 698.

COLLIER, J.—The petition for rehearing in this case was allowed for the purpose of reargument upon the proposition that a parol agreement for the acquiring of an interest in a mining claim in New Mexico was within the statute of frauds, and therefore void. The opinion of this court, rendered October 16, 1895, proceeded upon the theory that a parol agreement, whereby three persons associated themselves together for the purpose of prospecting, discovery, location, and development of mines for their joint benefit, and located and developed mines in pursuance thereof, constituted a holding in common of such mines under the mining laws of the United States; that the territorial statutes as to how such location should be made were merely regulatory in their character; and, whether such statutes denominated the possessory interest acquired, real estate, an interest in real estate, a chose in action, or a chattel, mere denomination of such interest could not raise the statute of frauds as a bar of its acquisition, if it was not there, nor take it away if it was. We held that "such statute must be construed in subordination to the laws of congress, as they are more as regulations than independent legislation;" and this would be so without respect to the fact whether such laws were those of a sovereign state or a dependent territory, as in each case they would be local regulations as to an interest or right sought to be acquired, or acquired under the mining laws of the general government. In the case of Murley v. Ennis, which was a Colorado case, reported in 2 Colo. 304, it made no difference that in that state a mining claim was declared by law to be real estate. In the case of Gore v. McBrayer, 18 Cal. 583, the agreement was verbal; and it

MINES: location: parol agreement: statute of frauds.

was conceded in the opinion, which was deliverd by BALDWIN, J., and concurred in by FIELD, C. J., and COPE, J. (a unanimous bench), that an interest in a mining claim was real estate by the law of California; but the court held the statute of frauds had no application. It is true that case differs from this so far as the location notice is concerned; there the name of the plaintiff appearing on the notice as one of the locators, while here plaintiff appears as sole locator of the Andrew Jackson mine, and John E. Eberle as sole locator of the Lexington, but the principle which counsel for defendant combats is squarely announced, viz., that such agreement is not within the statute of frauds. Coming down further, we find in Moritz v. Lavelle, 77 Cal. 10, exactly such a location notice as here with reference to the Lexington mine. The agreement was verbal, and to the effect that plaintiff was to pay all the expenses of the defendant in and about the occupying and relocation of a certain mine. The mine was located in the name of defendant as sole locator in the notice, with plaintiff as a witness, upon the express oral agreement between them that, in consideration of the former agreement about paying expenses, defendant would transfer by deed to plaintiff an undivided one half interest in the mine. Plaintiff sued for specific performance, and, being met by demurrer that the contract was within the statute of frauds, the demurrer was overruled; Gore v. McBrayer, supra, being cited, among other authorities. If this case is authority in point so far as the Lexington mine is concerned, there can be no doubt as to its being equally pertinent as to the Andrew Jackson, which was located in the name of plaintiff alone. Again, we find a California case (Settembre v. Putnam, 30 Cal. 490) which announces the principle that if two or more persons, as mining partners, claim and develop a mine situated upon land owned by a third person, and the partners verbally authorized one of their number to purchase the land of

the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in trust for them; SAWYER, J., delivering the opinion of the court.

Why, it may be asked, may not a verbal agreement to acquire a possessory right to a mining claim, and eventually a title thereto from the government, be effectual to constitute a holding in trust, if a title conveyed by an individual to one of the parties constitutes a holding in trust? One title results from the performance of acts required by law; the other by act of parties. In Traphagen v. Burt, 67 N. Y. 30, it was held that verbal agreement to purchase and improve real estate on joint account, showing equally the profits and losses, was not within the statute of frauds where several farms were purchased thereunder, and the deeds as to all save one were taken in the joint names of the parties, and improvements were made at joint expense upon all, and cattle and other property were purchased for each and all. The court, in discussing that case, showed that there was such a part performance as made a resulting trust in favor of the plaintiff. In the case at bar the evidence shows that in pursuance of the agreement to prospect, locate, and develop the three mines located, one in the name of one of the parties, one in the name of another, and one in the name of the third, expense was incurred by plaintiff as to the three, work was done on the three, and the assessment work for some of the years was done off of all three, but for the purposes of developing all by means of a tunnel. Why is this not, as declared in Traphagen v. Burt, supra, a partnership for acquiring real estate, and why, under the circumstances, would there not be a resulting trust? It is to be remembered that this objection applies in no way whatever to the status of the plaintiff at the time of bringing suit, for at that time he had, by deeds of conveyance from the other two parties to the verbal

agreement attacked here, become vested with the entire interest in the three mines; but it only applies to the question whether such an agreement, and work done and money expended thereunder, constituted a holding in common. Surely, if the statute of frauds has no application to the taking up of a mining claim, as decided by the Colorado and California cases, supra, nor to a partnership for the acquiring of land and creating a resulting trust where there is part performance, as decided in Settembre v. Putnam and Traphagen v. Burt, supra, at least a holding in common under the mining laws should be held to exist.

It is admitted, as we understand the contention and the brief of defendants in error, that the case of Book v. Mining Co., 58 Fed. Rep. 119, is an authority directedly and pointedly against their contention; and yet, as we pointed out in the opinion as to which the rehearing is asked, this case does not go at all to the extent of that. Here is a case where locations are made for the joint interest of all. There was a case where employees of a corporation made the location for the benefit, not of themselves, but of the corporation employing them. We quote from that decision (HAWLEY, Judge), on the subject of the statute of frauds: "The statute of frauds relied upon by complainants has no application whatever to the facts of this case. An agreement to locate a mining claim for the benefit of another need not be in writing. If a party in pursuance of such an understanding, at the expense of another, locate the claim in his own name, he holds the legal title to the ground in trust for the benefit of the party for whom the location was made, and such party could, on making the necessary proofs, compel the locator of the mining claim to convey the title thereof to him, although the agreement to do so was not in writing. This familiar principle has often been applied in cases where a party has entered into an oral agreement to locate min-

ing ground for the joint benefit of himself and others, and makes a location in his own name. It has always been held that such oral agreements are not within the statute of frauds. Gore v. McBrayer, 18 Cal. 582; Moritz v. Lavelle, 77 Cal. 10; 18 Pac. Rep. 803; Hirbour v. Reeding, 3 Mont. 13, and Welland v. Huber, 8 Nev. 203." The case at bar is one where, in the language of the learned judge, "this familiar principle has often been applied." Seeing no error in our former opinion, it will be again ordered that the judgment of the court below be reversed, and this cause stand for a new trial.

SMITH, C. J., concurs. LAUGHLIN and BANTZ, JJ., dissent.

INDEX.

ABANDONMENT. See ABATEMENT, 1.

ABATEMENT.

1. PLEA TO MERITS—ABANDONMENT.—By pleading to the merits defendant abandoned his pleas in abatement.

2. ID.—JOINT OBLIGATION—NONJOINDER OF CO-OBLIGOR—DEMURRER.—A demurrer to a plea in abatement to an action against one of two persons, on the ground that the obligation was joint, and the co-obligor was not joined, was properly sustained, under section 1846, Compiled Laws, providing that, in all cases of joint obligations of co-partners and others, suits may be brought against any one or more of those liable.

3. ID.—ACTION AGAINST SINGLE PARTNER—DEMURRER.—So was a demurrer to a plea in abatement to an action against a single partner, on the ground that his co-partner was not joined, properly sustained, under section 1886, Compiled Laws, providing that suit may be brought by or against a partnership as such or against all or either of the individual members. The fact that defendant was sued as C., under the firm name of O. J. & Co., amounted to nothing more than a descriptio personæ.—Curran v. Boot & Shoe Co., 417.

See, also, CRIMINAL LAW, 1.

ACCOMPLICE. See CRIMINAL LAW, 53, 54.

ACCOUNTING. See MORTGAGES, 1; PARTNERSHIP, 2.

ACTION. See ABATEMENT, 2.

ADMINISTRATOR. See CONTEMPT, 1.

AFFIDAVIT. See CRIMINAL LAW, 18.

ALIBI. See CRIMINAL LAW, 33, 36.

AMENDMENT. See ASSUMPSIT, 4; CRIMINAL LAW, 39–42.

APPEAL. See HABEAS CORPUS, 3; INSTRUCTIONS, 4; PRACTICE, 2; REPLEVIN.

APPELLATE PRACTICE. See CONDITIONAL SALE of PERSONAL PROPERTY, 2; CRIMINAL LAW, 61.

ASSAULT. See CRIMINAL LAW, 67.

ASSUMPSIT.

1. PLEADING—DEFECTIVE SIMILITER—WAIVER.—In an action of assumpsit, where defendant, after moving to dismiss for failure of plaintiff to join issue on the pleas of the general issue, went to trial on the merits, without objection to the want of a properly signed similiter, she thereby waived all objection on that account.

ASSUMPSIT. Continued.

2. ID.—HUSBAND AND WIFE—LIABILITY OF WIFE FOR DEBTS OF HUSBAND —NECESSARIES—PLEADING.—In such action against the husband and wife jointly for goods sold, the refusal of an instruction requested by the wife that by the laws of this territory a married woman is not liable for the debts of her husband, and that, before the jury could find the issues against her, they must find that the goods were sold to her, and not to her husband, was error, especially where it was not alleged in the declaration that the goods sold were necessaries.

3. ID.—JOINT CONTRACT—VERDICT—JUDGMENT.—Where defendants were sued on a joint contract, and the verdict was against them both jointly, it was an entirety, and the judgment should have been entered against both, or a new trial granted as to both; and it was error to set aside the verdict as to one and enter judgment as to the other.

4. ID.—AMENDMENT AFTER VERDICT.—An amendment by dismissal after verdict is not authorized by section 1911, Compiled Laws, 1884, providing that a party may "at any time before verdict, judgment, or decree," amend upon such terms as the court may think proper. —Holmes v. Tyler, 613.

See, also, PARTNERSHIP, 2.

ATTACHMENT.

NONRESIDENCY—TRAVERSE—DEMURRER.—Where the defendant filed a traverse of the attachment in a suit on a joint obligation, alleging the residence in the territory of one of the partners, not joined as defendant, but not denying the nonresidence of defendant, the sustaining of a demurrer to the traverse was proper, plaintiff having the right to bring suit against one or more of the parties individually as he might elect; and the fact of the levy being made upon the partnership property presented no reason for the quashing of the writ.—Curran v. Boot & Shoe Co., 417.

See, also, CONTEMPT, 1.

ATTORNEYS.

1. UNPROFESSIONAL CONDUCT.—An attorney engaged for the defense in an important criminal trial, has the right to ascertain by proper and legitimate means the nature, strength and credibility of the testimony to be offered in the case; and his simply visiting a witness to honestly learn what will be his testimony in the case is not unprofessional conduct, so long as he does not, by act or word, or in any manner, attempt to influence the witness to conceal, modify, or falsely change his testimony.

2. ID.—PROCEEDING FOR DISBARMENT—UNPROFESSIONAL CONDUCT—EVIDENCE—SUFFICIENCY.—The evidence in this cause, under the several specifications set forth in the complaint herein filed, charging the respondents with unprofessional conduct in connection with a certain criminal trial, in visiting and attempting to induce an important and material witness not to testify, or, if he did, to change his testimony, or refuse to testify on the ground that he would criminate himself, and in endeavoring to induce and inducing other important and material witnesses to testify falsely, on such trial,—is considered by the court in respect to each, and held insufficient to sustain any, of the charges and specifications against respondents therein made.—In re Catron, 253.

BONDS. See COUNTY TREASURER'S BOND; MORTGAGES. 4; POSTMASTER, 1; PRACTICE, 2, 4.

BURDEN OF PROOF. See CRIMINAL LAW, 27, 33, 60, 68.

CHALLENGES. See CRIMINAL LAW, 62; JURY, PETIT.

CLAIM AGAINST ESTATE.

PROOF OF ALLOWANCE—LIMITATION.—Where a claim against an estate, filed with the clerk of the probate court, appeared to have been barred by limitation, and it did not affirmatively appear from the record that it had been allowed by the court,—Held: That the mere indorsement upon the account, of its approval by some one styling himself "probate judge," was not sufficient evidence of its allowance by the probate judge.—Janes v. Brunswick, 345.

CONDITIONAL SALE OF PERSONAL PROPERTY.

1. TITLE—UNRECORDED CONTRACT—REPLEVIN.—A contract for the sale of personal property conditional upon the title remaining in the vendor until the payment of the purchase price, is not within the recording act of 1889 (Session Acts, 1889, ch. 73, sec. 1); and the vendor, out of whom the title to the property does not pass until the performance of the condition precedent, may maintain an action of replevin for its recovery as against the claim of an attaching creditor of the vendee, although the instrument be unrecorded.

2. ID.—TENDER—APPELLATE PRACTICE.—In such case, where a stipulation upon which the case was tried did not disclose whether or not plaintiff had tendered the return of the notes given for the deferred payments of the purchase money, the point that he could not maintain his action until he had done so, could not be raised, by the defendant and plaintiff in error, for the first time in the appellate court.—Maxwell v. Tufts, 396.

CONTEMPT.

1. FAILURE OF ADMINISTRATOR TO OBEY DECREE OF COURT—ATTACHMENT.—An attachment for contempt will not be issued against an administrator for failure to obey a decree of court ordering him to pay a sum of money found to be due his co-administrator on a settlement of the estate, where it appears that the defendant administrator has no such sum in his possession, and is unable to obtain the same.

2. ID.—IMPRISONMENT FOR DEBT—REPEAL OF STATUTE.—Held: That so much of Compiled Laws 1884, section 2158, as provides for execution against the body of defendant, was repealed by section 2183, Id., forbidding execution against the body of the execution debtor, except in cases of fraud and personal injuries with the proviso therein contained.

3. ID.—FINDING—EVIDENCE.—In such proceeding, a decree finding that a certain sum of money was in the hands of the defendant administrator, and ordering a portion thereof, found to be due defendant's co-administratrix, to be paid to her, was not sufficient to show that defendant had such sum in his possession or under his control, so as to make him guilty of contempt in not paying it over, where defendant denied under oath that he had the money or had been able to obtain it.—In re Jaramillo, 598.

CONTEMPT. Continued.

4. ID.—NEWSPAPER PUBLICATION—PUNISHMENT.—In a proceeding for contempt against the publishers of a newspaper for the publication therein of an article attributing improper motives to the members of the supreme court in the institution of a disbarment proceeding then pending, the publisher and editor of such paper may be summarily punished by the court for contempt, by imprisonment, for such publication, made with his knowledge, although he may disclaim any intention of reflecting upon the court, or any of its members. In re Hughes, 225.

CONSPIRACY. See CRIMINAL LAW, 8.

CONSTITUTIONAL LAW. See CRIMINAL LAW, 16.

CONSTRUCTION OF STATUTES. See CRIMINAL LAW, 15, 18; JURY, PETIT; LICENSE, DRAMSHOP; MECHANICS' LIEN, 1; TERRITORIAL LEGISLATION, 1.

CONTINUANCE. See CRIMINAL LAW, 19, 30.

CONTRACTS. See ASSUMPSIT, 3; CONDITIONAL SALE OF PERSONAL PROPERTY, 1; MECHANICS' LIEN, 6.

CORPORATIONS.

1. LIABILITY OF STOCKHOLDERS ON SUBSCRIPTIONS.—Where stock subscribed on the formation of a corporation, was sold upon an assessment made thereon, the creditors of the corporation were not precluded thereby from recovering on the failure of the stockholders to pay the ten per cent of their subscriptions, required by statute to be paid on incorporating; nor could such failure be set up by the stockholders in avoidance of the statute to escape liability.

2. ID.—PAYMENT OF SUBSCRIPTIONS IN CHECKS NOT TO BE PRESENTED—DATE OF OBLIGATION TO PAY.—Where the ten per cent of the subscriptions to the capital stock of a corporation, required by statute to be paid on the formation of the corporation, was paid in checks, which it was agreed should never be presented for payment, the obligation to pay dated from the day of the filing of the articles of incorporation in the office required by law to be filed.

3. ID.—RIGHT OF CREDITORS TO BE PAID OUT OF UNPAID SUBSCRIPTIONS—EVIDENCE.—The fact that the creditors of a corporation were told by officers of the corporation, before the indebtedness was incurred, that they would be paid out of the proceeds of certain bonds the corporation hoped to sell, was not sufficient to defeat their right to payment out of the unpaid subscriptions, where it was not claimed that the corporation, as such, had made any such agreement with the creditors, or that such officers had any authority to speak for the corporation, and the witnesses testified merely that they understood that the creditors "understood" that they were to look solely to the proceeds of the bonds for payment.

4. ID.—DISCOVERY OF FRAUD—LIMITATION.—Where it was stated in the articles of incorporation of a company that ten per cent of the subscriptions to its capital stock had been paid to the treasurer of the company, and the treasurer made affidavit that that amount had been actually paid him, the fact that, at the time an indebtedness was incurred by the corporation, the creditor was informed, by the treasurer, that such subscription had not been paid in, did not, under the statute, constitute a discovery so as to make the statute of limitations (Comp. Laws 1884, sec. 1865) begin to run.

CORPORATIONS. Continued.

5. ID.—PARTIES—ANSWER TO ORIGINAL BILL—SERVICE AND FAILURE TO ANSWER AMENDED BILL, EFFECT OF.—In such proceeding, where it appeared that one of the parties defendant answered the original bill, and was served with notice of the amended bill, but failed to answer the same, and complainant, instead of taking a decree pro confesso against him, treated him as having answered,—Held: That he was to be deemed as having denied the material allegations of the amended bill, and included in an affirmance of decree as to the other defendants.—Albright v. T. S. F. & N. R. Co., 110.

6. ID.—UNPAID SUBSCRIPTIONS TO CAPITAL STOCK.—The unpaid subscriptions to the capital stock of a corporation are, in equity, a trust fund for the benefit of creditors.

7. CREDITORS' BILL—JUDGMENT—EXECUTION—RETURN OF NULLA BONA. Held: That where it is sought to reach, by equitable process, the equitable interests of a debtor, the bill must set forth a judgment in the jurisdiction where the suit is brought, the issuing of an execution thereon, and its return unsatisfied, or must allege facts showing it was impossible to obtain such a judgment in any court within such jurisdiction, unless otherwise provided by statute. (Tube Works Co. v. Ballou, 146 U. S. 523.)

8. HEARING—DECREE PRO CONFESSO AS TO DEFENDANT PERSONALLY SERVED, BUT NOT ANSWERING—PROOF.—Held: That where complainant brings his case to a hearing and fails to take a decree pro confesso against a defendant personally served, but not answering, before taking a decree against such defendant, complainant must prove his case.

9. AMENDED BILL, FAILURE TO SERVE NOTICE OF.—Where leave was granted to file an amended bill on condition that defendants be served with notice thereof before the cause come to a hearing,—Held: That a decree pro confesso taken on the same day without serving defendants with process could not stand against them.—Albright v. T. S. F. & N. R. Co., 422.

10. ID.—RAILROAD—GRANT OF PUBLIC LANDS—EXEMPTION—RIGHT OF TERRITORY TO TAX.—Where, by section 2 of an act of congress incorporating the defendant company, the right of way was granted through the public lands for the construction of a railroad and telegraph, to the extent of one hundred feet in width on each side of the road, "including all necessary grounds for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations," providing that "the right of way shall be exempt from taxation within the territories of the United States." HELD: that such grant conveyed to defendant company the title of the United States, to the lands used for the purposes named, absolutely and the right of way within the meaning of the exemption clause included the roadbed, rails, and ties, station buildings, workshops, depots, machine shops, etc., which are not subject to taxation by the territory.—Trust Co. v. Territory, 673.

See, also, INTERVENTION, 2, 3.

COUNTY TREASURER'S BOND.

SUIT ON—REPORT TO COUNTY COMMISSIONERS—EVIDENCE—ESTOPPEL IN PAIS.—In an action of debt against the principal and sureties on a county treasurer's bond, for the recovery of certain moneys claimed to be due from defendants on account of a breach of the con-

COUNTY TREASURER'S BOND. Continued.

ditions of the bond, where it appeared that the treasurer served one full term and a part of a second term, and the bond was given at the beginning of the second term, a report by the treasurer, as to funds in his hands, made during the second term and after the filing of the bond, and approved by the county commissioners, did not estop the sureties from showing that the default occurred during the first term.—Salazar v. Territory, 1.

COURT OF PRIVATE LAND CLAIMS. See HABEAS CORPUS, 1.

CREDITOR'S BILL.

1. SUFFICIENCY OF ALLEGATIONS.—A judgment creditor causing property to be levied on and advertised for sale under the judgment, can not maintain a bill to remove, as a cloud upon the title, a conveyance of the property by the judgment debtor, made after the judgment lien attached, upon a mere allegation that, by reason of such conveyance, sufficient could not be realized from the sale of the property to satisfy the judgment, where it is not alleged in the bill that the judgment debtor has no other property out of which the judgment might be satisfied.

2. ID.—BILL TO QUIET TITLE—JURISDICTION.—A creditor's bill based upon a judgment lien on land, does not set forth such interest in the land as to vest the court with jurisdiction to entertain the suit to quiet title to the property.—Stanton v. Catron, 355.

CRIMINAL LAW.

1. PLEA IN ABATEMENT—PRESUMPTION.—On appeal in a criminal case, where the record does not show that a hearing was urged on a plea in abatement, the presumption is that the plea was abandoned.

2. ID.—PLEA OF NOT GUILTY, WITHDRAWAL OF—CHANGE OF VENUE—MOTION TO QUASH—JUDICIAL DISCRETION.—The trial court has discretionary power to refuse to permit defendant, after he has been granted a change of venue, to withdraw a plea of not guilty and substitute a motion to quash.

3. ID.—GRAND JURORS, OBJECTION TO QUALIFICATIONS OF, TOO LATE, WHEN.—An objection to the qualifications of a grand juror comes too late on motion in arrest.

4. ID.—STATEMENT NOT INCORPORATED IN BILL OF EXCEPTIONS—IMPEACHMENT OF RECORD.—A statement not incorporated in a bill of exceptions can not be used to contradict the record, and will not be considered on appeal.—Territory v. Barrett, 70.

5. ID.—CONFLICT OF TESTIMONY—VERDICT.—A verdict of conviction on conflicting testimony will not be disturbed on appeal.

6. ID.—LARCENY—INSTRUCTION.—An instruction that if a theft was committed, and the jury found the opportunity was such as to point to the defendant as the sole perpetrator, or as the perpetrator with others with whom she acted in concert, they might find her guilty, was a proper instruction.

7. ID.—INSTRUCTION.—An instruction asked covered by instructions previously given, was properly refused.

8. ID.—CONSPIRACY—EVIDENCE.—Complicity in crime may be shown by evidence other than that which is direct and positive.

CRIMINAL LAW. Continued.

9. ID.—WITNESS—TESTIMONY OF CHILD TEN YEARS OF AGE—WEIGHT OF TESTIMONY—JURY QUESTION.—The admission of the testimony of a child ten years of age was not an abuse of judicial discretion, where it was disclosed upon examination on the voir dire that the child was technically qualified; and the weight of his testimony was a question for the jury.

10. ID.—WITNESS—ADMISSIBILITY OF TESTIMONY OF ACCUSED AS AFFECTING CREDIBILITY.—A defendant offering to testify is subject to cross-examination the same as any other witness; and it was not improper to draw from such witness the fact that she had for some time sustained illicit relations with one to whom she was not married. The act, though tending to degrade her, was admissible as affecting her credibility.—Territory v. De Gutman, 92.

11. ID.—SELLING LIQUOR TO INDIANS—NEW TRIAL.—Where, on a conviction of defendant for selling liquor to Indians, a witness for the prosecution, who had testified that he had seen defendant sell whisky to an Indian, confessed that he had sworn falsely, but there were two other witnesses who testified to defendant's guilt, a new trial was properly refused.

12. ID.—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF VERDICT BY JUROR—NEW TRIAL.—An affidavit by a juror, that some of the jurors had stated during their deliberations that a witness, who afterward confessed to perjury, was reliable, and that defendant was convicted on such statements, was no ground for new trial, where there was nothing to show that any of the jurors based their verdict solely on the testimony of such witness, or that such statements caused any of them to change their votes from acquittal to guilty, and there was other testimony to facts sufficient to establish defendant's guilt.

13. ID.—NEW TRIAL—JUDICIAL DISCRETION.—The granting or refusing of a new trial rests in the sound discretion of the trial court, and will not be reversed on appeal, unless it clearly appears that such discretion has been grossly abused.—United States v. Biena, 99.

14. ID.—MURDER—PENALTY—ERRONEOUS JUDGMENT, POWER OF SUPREME COURT TO CORRECT.—Where, upon indictment for murder in the first degree, the jury returned a verdict of guilty, and the court sentenced defendant to imprisonment in the penitentiary for a term of years, when, under a statute in force at the time the crime was committed, the penalty therefor was death—Held: That, under section 2479, Compiled Laws, 1884, relating to appeals in criminal cases, the supreme court has no power to enter, or to order the trial court to enter, a different judgment; but the defendant is not entitled to a discharge for such error, where the indictment is valid, and nothing has occurred thereunder amounting to an acquittal.

15. ID.—MURDER—INSTRUCTION—VERDICT—RECOMMENDATION TO MERCY—CONSTRUCTION OF STATUTE.—A charge to the jury, on a trial upon indictment for murder in the first degree, that, in case they found defendant guilty, the court would consider a recommendation to mercy in fixing his punishment, was an unauthorized interference with the deliberations of the jury, and reversible error. The statute (Acts 1891, p. 151), permitting the jury to recommend clemency, has no application to cases where the punishment is single and specific, and where no discretion is allowed as to the punishment to be inflicted. (Territory v. Romine, 2 N. M. 114.)—Territory v. Griego, 133.

CRIMINAL LAW. Continued.

16. ID.—TRIAL BY JURY—CONSTITUTIONAL LAW.—The common law jury of twelve men is the jury provided by article 6 of the amendments to the constitution of the United States, guaranteeing to the accused, in all criminal prosecutions, the right to a "speedy, public trial by an impartial jury;" and a jury consisting of any less than this number is not a common law jury or such as is contemplated by the constitution.

17. ID.—FELONY—WAIVER OF RIGHT TO TRIAL BY COMMON LAW JURY.—The accused in a felony case can not waive his constitutional right to a trial by common law jury of twelve men, and a verdict by a jury of less than that number will be set aside. (Cooley, Const. Lim. 319.) Territory v. Ortiz, 154.

18. ID.—APPLICATION FOR CHANGE OF VENUE—AFFIDAVIT—CONSTRUCTION OF STATUTE—JUDICIAL DISCRETION.—Under chapter 77, Laws of 1889, requiring that, in a criminal case, the defendant's affidavit for change of venue shall "be supported by the oath of two disinterested persons that they believe the facts therein stated are true," the court may, in its discretion, require defendent to produce in court the persons making such affidavit, to be examined orally under oath.

19. ID.—CONTINUANCE—JUDICIAL DISCRETION.—The granting or refusal of an application for a continuance is a matter resting in the sound discretion of the trial court, whose judgment will not be disturbed, where there has been no abuse of that discretion. Territory v. Leary, 180.

20. ID.—MURDER—INDICTMENT—EVIDENCE—INSTRUCTION AS TO DEGREE NOT GIVEN.—On a trial, on indictment, for murder, if there is any evidence which can bring the case within the definition of any degree not given, it is the duty of the court, whether requested to do so or not, to charge the jury as to such degree, and a failure to do so is reversible error.

21. ID.—MURDER IN FIRST DEGREE—EVIDENCE—FAILURE TO INSTRUCT AS TO SECOND DEGREE.—Where, on a trial, on indictment, for murder in the first degree, defendant testified that deceased came to his room and abused him, that he left the room and went in search of the town marshal, that on his return shortly thereafter deceased was standing with another a few feet from the room, and, as defendant approached, rushed upon him, and defendant, retreating about ten or twelve feet, shot and killed deceased with a revolver he had borrowed when he went for the marshal,—Held, that the failure of the court to charge the jury as to murder in the second degree, was reversible error. (Territory v. Young, 2 N. M. 93; Territory v. Romine, Id. 114; Territory v. Nichols, 3 Id. 103.)—Territory v. Friday, 204.

22. ID.—MURDER—KILLING BY BURNING, SUFFICIENCY OF INDICTMENT CHARGING.—Under the statute defining murder generally, and declaring that all murder which shall be perpetrated by means of poison, lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, etc., shall be deemed murder in the first degree, an indictment charging a killing by burning as being "felonious, unlawful, willful, and with express malice aforethought," is sufficient to sustain a conviction of murder in the first degree, without using the words "deliberate and premeditated," which are used in the statute as describing murder in the first degree in killings other than by poison, lying in wait, and torture.

CRIMINAL LAW. Continued.

23. ID.—MURDER IN FIRST DEGREE—REASONABLE DOUBT—JUSTIFIABLE HOMICIDE—INSTRUCTIONS.—Where the court did not, in terms, tell the jury that if defendants presented testimony, tending to show self-defense, such as would create in their minds a reasonable doubt of guilt, they must acquit, yet did, in effect, do so, by charging them as to what constituted justifiable homicide, in connection with its instructions upon reasonable doubt, and the necessity of the territory's proving every element of murder in the first degree, though error in not giving such instructions, was not prejudicial error.

24. ID.—MURDER IN FIRST DEGREE—FAILURE TO CHARGE AS TO SECOND DEGREE—TESTIMONY.—In such case, if the testimony tended to show murder in the second degree, it would be reversible error to have omitted an instruction on such degree (Territory v. Friday, 204, ante); but held, that the testimony did not disclose that such instruction should have been given.

25. ID.—CHANGE OF VENUE.—The overruling of a motion for change of venue, based on the affidavits of defendants' attorneys, was not error.—Territory v. Vialpando, 211.

26. ID.—KNOWINGLY PURCHASING PERSONAL PROPERTY FROM OTHER THAN OWNER—INDICTMENT—PROOF—VARIANCE.—On indictment for knowingly purchasing personal property from one not the owner thereof, an allegation of ownership by two persons is not sustained by proof of ownership by one of them only.—Territory v. Ortiz, 220.

27. ID.—CUTTING TIMBER ON PUBLIC LAND—PROOF—ONUS.—Where, on a trial, on indictment for the unlawful cutting of timber on the public land, the defendant proved that he had a mineral entry on the land, entitling him, under the law, to cut timber therefrom for certain purposes, the presumption was that the cutting done was for such purposes, and the burden was on the prosecution to prove, beyond a reasonable doubt, that it was not for such purposes.

28. ID.—INSTRUCTION—PREJUDICIAL ERROR.—An instruction, in such case, requiring the jury to determine, as a matter of fact, the question of the ownership or nonownership of the tract of land, which the prosecution admitted to be his land, was prejudicial to defendant. United States v. Routledge, 385.

29. ID.—REVIEW OF JUDGMENTS OF DISTRICT COURTS BY WRIT OF ERROR—STAY OF EXECUTION.—The judgments of the district courts of the territory of New Mexico, in criminal cases, are reviewable in the supreme court of the territory by writ of error, which operates as a stay of execution in such cases, though no provision is made for supersedeas, being a supersedeas by implication.

30. ID.—SPECIAL TERM—CONTINUANCE BEYOND TIME OF REGULAR TERM—VALIDITY.—Proceedings, in a murder case, at a special term of the district court, were not invalid because the term was continued beyond the time fixed for the regular terms of the other counties of the district.

31. ID.—HOMICIDE—INDICTMENT—PLEADING—SUFFICIENCY.—A charge in an indictment that the deceased "instantly" died of mortal wounds inflicted upon him by the accused, was sufficient to constrain the conclusion that his death was effected on the spot, at the place where it was caused, as the equivalent of "then and there."

CRIMINAL LAW. Continued.

32. ID.—MURDER IN FIRST DEGREE—INDICTMENT—PLEADING—SUFFICIENCY.—An indictment charging that the accused "unlawfully, feloniously, willfully, purposely, and with express malice aforethought did shoot and kill" deceased, embodied in its terms all the elements necessary to constitute murder in the first degree, so distinctly and comprehensively as to exclude murder in any less degree.

33. ID.—MURDER—ALIBI—ONUS—REASONABLE DOUBT—INSTRUCTION.—An instruction that it was incumbent on defendants to establish, by a preponderance of the evidence, that they were not at the place where the murder was committed or were in some other place, away from the place of the murder, but not beyond a reasonable doubt, and imposing on the prosecution the obligation to demonstrate beyond a reasonable doubt that the defendants were at the place where deceased was killed, and giving defendants the benefit of their testimony to create in the minds of the jury a reasonable doubt as to their being at the place, was not error.

34. ID.—MURDER—EVIDENCE—ADMISSIBILITY.—On a trial of B., and others, on indictment for the murder of C., where G. testified that he was approached by V. with a proposition to assassinate C., that the details of the proposed assassination were discussed by V. and B. with him, that they informed him that two of the other defendants were in the agreement, that their object was to remove C. because of his prominence and great strength in his political party, to which they were antagonistic and wished to destroy in the county, that he seemingly acquiesced in their proposition, but, having no reason to murder C., determined, on reflection, to put him on his guard, and accordingly sent him a note (which was found among the papers of C. after his death and identified by the witness), and that afterward to avoid importunity from V. and B. to cooperate with them in the assassination of C., and from fear of them as members of a certain secret society, under apprehension that they would become aware of his betrayal of them, left the territory—Held: That his testimony and the note were admissible to prove the conspiracy.

35. ID.—WITNESS CONVICTED OF MISDEMEANOR—COMPETENCY OF TESTIMONY.—Conviction of an offense not greater than a misdemeanor, either by the statute or at common law, will not render a witness incompetent to testify.

36. ID.—MURDER—ALIBI—CROSS-EXAMINATION OF ACCUSED—JUDICIAL DISCRETION.—In a murder trial, where defendants, claiming an alibi, testified to their whereabouts from 7 o'clock P. M. of the night of the murder, it was within the discretion of the court to permit them to be cross-examined as to their whereabouts from the noon preceding up to that time. The rule that a witness can not be cross-examined as to any facts irrelevant or collateral to the issue merely to contradict him, does not exclude the contradiction of a witness as to any facts immediately connected with the inquiry.

37. ID.—MURDER—ADMISSIBILITY OF TESTIMONY—JUDICIAL DISCRETION. The refusal, on such trial, to permit defendants, who were at a certain place at a certain time prior to the murder, to introduce testimony to show that the persons, who testified that they saw defendants at another place at that time, were not there themselves at that time, was a matter within the sound discretion of the court.,

CRIMINAL LAW. Continued.

38. ID.—MURDER—CROSS-EXAMINATION OF DEFENDANTS FOR PURPOSE OF IMPEACHMENT—JUDICIAL DISCRETION.—The right of the court, in such case, to permit defendants to be asked, on cross-examination, as to the killing by them, of another, a few days after the murder in question, for the purpose of discrediting them, was within the limits of a sound judicial discretion.

39. ID.—AMENDMENT OF RECORD NUNC PRO TUNC—PROOFS REQUIRED. In such case, an amendment, by the trial court, of the record, by an order nunc pro tunc, to show arraignment and pleas of not guilty, was warranted by the trial judge's recollection of the facts of arraignment and pleas of not guilty, shown by the affidavits of the clerk, the sheriff, district attorney, and court stenographer, if not by a recital in the record alone, that "issue being joined," the trial was had, and a verdict of guilty returned.

40. ID.—RECORD, CORRECTION OF, AFTER EXPIRATION OF TERM.—The correction, by the trial court, of an omission or false entry in a record, by an order nunc pro tunc, is not limited to the term at which such omission or entry was made, but may be made "whenever the ends of justice may require it." Comp. Laws 1884, sec. 1836.

41. ID.—AMENDMENT OF RECORD BY ORDER NUNC PRO TUNC—EXTENT OF POWER.—And this power of the trial court to correct the record by an order nunc pro tunc extends to criminal cases.

42. ID.—POWER OF AMENDMENT, AFTER REMOVAL OF CAUSE BY WRIT OF ERROR.—And the trial court can not be deprived of this power to amend its record so as to make it conform to the truth, by the removal of the cause by writ of error.

43. ID.—QUALIFICATION OF ASSOCIATE JUSTICE TO SIT OUTSIDE OF HIS DISTRICT—CONSTRUCTION OF STATUTES.—The judicial power vested in the district courts by act of congress of September 9, 1850, to be exercised in each district, "by one of the justices of the supreme court," does not require that it shall be exercised by any particular one of the justices. There is nothing in the language of that clause, nor in the act of congress of June 10, 1858, warranting such a construction as would confine the exercise of the power to the particular justice assigned to the district, when such justice is otherwise disqualified; and the maxim expressio unius exclusio alterius, does not apply.—Borrego et al. v. Territory, 446.

44. ID.—MURDER—APPEAL—FAILURE OF CLERK TO SEND UP TRANSCRIPT. On appeal, by the defendant in a murder case, which by section 2483, Complied Laws, operates as a supersedeas, in such cases, it is the duty of the clerk, under section 2476, to send up the transcript without delay; and the failure or refusal of the appellant to pay for such transcript, can not be set up by the clerk as an excuse for his failure to do so.

45. ID.—INSTRUCTIONS.—It is the duty of the trial court to instruct the jury properly and fully as to the law in all criminal cases, as well as in civil cases, whether requested to do so or not, and its failure to do so is reversible error.—Territory v. Friday, 8 N. M. 204.

46. ID.—MURDER—INSTRUCTION.—In a murder case, where the record utterly failed to show how or under what circumstances the killing occurred, the court erred in giving an instruction for murder in the first degree only. (LAUGHLIN, J., dissenting.)—Aguilar v. Territory, 496.

CRIMINAL LAW. Continued.

47. ID.—MURDER—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.—In a murder case, where there was no eyewitness to the killing, and death was shown to be the result of a gunshot wound, and there was no evidence to show that the murder was by poison or torture, and no circumstances showing necessarily that it was done by lying in wait, or that it was perpetrated in committing, or attempting to commit, a felony,—Held: That the failure of the court to instruct the jury in any other than the first degree, was reversible error, as held by this court in Aguilar v. Territory, 8 N. M. 496.

48. ID.—MURDER—EVIDENCE—DEGREE OF MURDER—JURY QUESTION. In such case, where the evidence was that deceased and defendant were neighbors in a small village, and partners in business; that they were on unfriendly terms; that deceased was seen to go up a prairie trail, followed by defendant carrying a gun; that soon afterward a shot was heard, and in a short time defendant was seen returning with a gun, walking as if he wished to escape observation; that deceased was found dead from a gunshot; that a shell was found shown to be made for a gun not in general use, which kind of gun was found concealed in defendant's house,—Held: That under such circumstances the question as to the degree of murder was for the jury.

49. ID.—SANITY OF WITNESS—REQUEST FOR INSTRUCTION.—Where the testimony of a witness, whose sanity is attacked, is important, a special request for an instruction, as to his sanity or insanity, should be granted, though the testimony in the attack made be slight.

50 ID.—SANITY OF WITNESS—TESTIMONY OF NONEXPERT—COMPETENCY. Where the sanity of a witness is attacked, a nonexpert witness may be asked as to the demeanor of the witness on a certain occasion or under certain circumstances, for the purpose of placing before the jury the facts from which the degree of mental capacity of the witness may be inferred, but not questions directly calling for an opinion as to his sanity or insanity, nor questions as to his general reputation in that regard.—Territory v. Padilla, 510.

51. ID.—PERJURY—INDICTMENT—PLEADING.—An indictment for perjury need not aver matters in detail, showing how the question in relation to which the testimony was given became material, but the pleader may, at his election, charge it was thus material, or set out facts from which its materiality will appear in law, and where the false testimony is delivered on the trial, the former is the common and better method. Overruling Territory v. Remuzon, 3 N. M. (Gil.) 648.

52. ID.—PERJURY—INDICTMENT—GENERAL AVERMENT—SUFFICIENCY.—A general averment, in an indictment for perjury, that the several alleged false statements, as set out in the indictment, are false, without specifically negativing any fact testified to by the witness, is fatal on demurrer.—Territory v. Lockhart, 523.

53. ID.—WITNESSES—ACCOMPLICES— PARDON — CREDIBILITY — IMPEACHMENT.—Where accomplices, previously convicted of crimes, who had been restored to competency as witnesses by pardon, appeared for the prosecution, the court erred in refusing to permit them to state, on cross-examination, the nature of and facts in connection with such crimes of which they had been convicted, in order to impeach their credibility; and in ruling as to one of such witnesses that, if it should appear that the witness had been useful in discovering the

CRIMINAL LAW. Continued.

crime, it would be no reason for the court to depart from "fundamental principles of law, as it appreciates them," as implying in the opinion of the judge it was truthful testimony.

54. ID.—ACCOMPLICES—PARDON—INDUCEMENTS TO TESTIFY.—The court also erred in excluding evidence as to the liberty and favor granted such witnesses by the prosecution notwithstanding their conviction for such crimes, and in confining the inquiries to whether the inducements had been offered by persons having authority. The jury should have been instructed that they must consider the inducements under which such testimony was offered.—Territory v. Chavez, 528.

55. ID.—HOMICIDE—SUDDEN AFFRAY—EVIDENCE—INSTRUCTION.—On a prosecution for murder, where the evidence was that defendant fired the fatal shot in a sudden affray between a party to which he belonged and that of deceased, in which the former were the aggressors, and several shots were exchanged,—Held: That a charge of murder in the second degree was supported by the evidence.

56. ID.—REMARKS OF PROSECUTING ATTORNEY TO JURY.—On such trial, a remark of the prosecuting attorney to the jury: "Gentlemen, you are all Americans; the defendant is an American; the victim a poor Mexican sheep herder. But I do not believe that, because the victim was a Mexican you will fail to do your duty,"—Held: That this language was not sufficient to justify a reversal.—Territory v. Chamberlain, 538.

57. ID.—MURDER—INSTRUCTIONS.—On a murder trial, an instruction that if one of the defendants shot and killed deceased while the other stood by without objecting or protesting, both were guilty of murder in the first degree, which did not even require the jury to find that the nonobjecting defendant knew or suspected the codefendant's design to kill deceased, nor that he was in a situation to prevent such killing, was prejudical error, although the verdict was for a conviction of murder in the second degree, the only instruction as to murder in the second degree consisting of a description of that offense following the terms of the statute, and the instructions for murder in the first degree being numerous and failing to correctly state the law.

58. ID.—INSTRUCTION—JURY QUESTION.—An instruction that if defendants made false statements as to the killing, it should be construed as tending to establish their guilt was an invasion of the province of the jury.

59. ID.—STATEMENTS OF OFFICERS IN RELATION TO OFFICIAL ACTS—INSTRUCTION.—An instruction that false statements by officers in relation to their official acts should be construed as an aggravation of their offenses, and if knowingly and willfully made, would justify the jury in disregarding the whole of their testimony, was erroneous. It is not only essential that the falsity should be willful, but it must also be in relation to a material fact. The law demands no higher standard for weighing the statements of fact by public officers than other citizens.

60. ID.—MURDER—MALICE—PRESUMPTION—ONUS—INSTRUCTION.—On a trial on indictment for murder, an instruction to the jury that malice is implied from the fact of killing and that it devolved upon defendants to establish the contrary, was error, especially where the killing was admitted, and the evidence for defendant tended to show that it was done under considerable provocation, after deceased had attempted to escape by slaying his guards.—Territory v. Lucero, 543.

CRIMINAL LAW. Continued.

61. ID.—INSTRUCTIONS—PRACTICE, APPELLATE.—Instructions in a criminal case, not excepted to below, are not reviewable in the appellate court.—Padilla v. Territory, 562.

62. ID.—JURY, PETIT—CHALLENGES.—In a capital case, when less than twelve jurors are in the box, and the regular panel is exhausted, to compel defendant to pass peremptorily on such jurors, before a special venire is drawn, qualified, and the names are in the box, from which the clerk may draw, and fill the panel, is reversible error. (Laws 1889, p. 26, sec. 24; Territory v. Barrett, 8 N. M. at p. 77.)

63. ID.—MURDER—CIRCUMSTANTIAL EVIDENCE, FAILURE TO INSTRUCT AS TO.—In a murder trial, where the evidence was wholly circumstantial, it was the duty of the court to instruct the jury fully as to the law of circumstantial evidence, and its failure to do so was prejudicial to the rights of defendant.

64. ID.—MURDER—CIRCUMSTANTIAL EVIDENCE—REFUSED INSTRUCTION.—In such case, an instruction offered by defendant that where circumstances alone are relied on for a conviction, they must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than that of defendant's guilt, and must satisfy the jury of his guilt beyond a reasonable doubt, fairly presented the law, and should have been given.—Territory v. Lermo, 566.

65. ID.—MURDER—EVIDENCE—INSTRUCTION.—On a trial for murder, where two witnesses for the prosecution, present at the killing, testified that defendant came to the camp of deceased, armed with a rifle, and, on deceased's saying to defendant that he had not delivered to him all his sheep, defendant called him a liar, and shot him, and defendant testified that deceased called him a liar, and then caught hold of the rifle, and attempted to take it away from defendant, when the rifle was accidentally discharged, and killed deceased,—Held, that the court properly refused to give instructions either in the second or third degrees.

66. ID.—MURDER—EVIDENCE—DEGREES—INSTRUCTIONS.—In such case, where the evidence showed murder in the first degree, or excusable homicide, and proper instructions were given on these degrees, an instruction which told the jury that in rendering their verdict they must either find defendant guilty of murder in the first degree, or that he was not guilty, was a proper instruction.—Sandoval v. Territory, 573.

67. ID.—INDICTMENT—ASSAULT WITH INTENT TO MURDER—INSTRUCTION.—On a trial on indictment charging an assault with intent to murder, an instruction to the jury that all that was necessary for the prosecution to prove, to warrant a verdict of guilty, was sufficient to satisfy them beyond a reasonable doubt that defendant did, at the time and place mentioned, make an assault upon the person of the prosecuting witness with the intent to inflict upon him bodily injury, was misleading and erroneous.—Territory v. Vigil, 583.

68. ID.—MISCONDUCT OF JURY—IMPEACHMENT OF VERDICT—ONUS—NEW TRIAL.—Where a verdict of guilty in a criminal case was impeached by the affidavits of persons not jurors, showing that the jury were permitted by the baliff to separate, visit saloons and drink intoxicating liquors,—Held: That it was incumbent on the prosecution to show that defendant was not prejudiced by such misconduct on the part of the jury, and for failure to do so defendant was entitled to a new trial.—United States v. Spencer, 667.

DECEDENT'S ESTATE.

1. CLAIM AGAINST—LIMITATION.—A claim against the estate of a decedent will be barred, under section 2225, Compiled Laws, 1884, unless filed with the clerk of the probate court within two years after decedent's death.—Janes v. Brunswick, 105.

2. ID.—SALE OF REAL ESTATE ON PETITION OF CREDITOR TO EXCLUSION OF OTHER CREDITORS.—Where, on the petition of a creditor of the estate of a decedent, whose claim had been allowed by the probate court, for a sale of the real estate of the decedent to pay its claim, on the ground that the personal estate of the decedent was insufficient for that purpose, and the executor had refused to commence any proceeding for the sale of the real estate to pay the debts, the district court granted an order for its sale allowing the petitioner to buy the same and apply its claim in payment, to the exclusion of the other creditors, whose claims had also been allowed, it was error.

3. ID.—SALE OF INTEREST OF OTHERS IN REAL ESTATE, NOT SUBJECT TO DECEDENT'S DEBTS—PROCEDURE UNDER STATUTES.—Though sections 2228 et seq., Compiled Laws, providing for the sale of decedent's real estate for payment of debts, does not authorize the sale of the interest of anyone else therein, not derived through decedent or liable for his debts, a proceeding thereunder for such sale may be joined with one under sections 2274 et seq., providing that, if the lands are not susceptible of division, so that an interest of the widow, not liable for the husband's debts, can be set apart, a sale of the whole may be made. But before such sale, the interest of the widow should be ascertained, that her rights may be protected at the sale.—First Nat. Bank v. Lee, 589.

DECREE.

1. INTERLOCUTORY, VACATION OF AT SUBSEQUENT TERM.—A decree establishing complainant's interest in certain land, but reserving an adjudication "as to its partition to a future term," was an interlocutory, and not a final decree, and subject to be set aside at a subsequent term of the court, being up to that time unappealable.

2. ID.—SALE OF MINOR'S INTEREST IN REALTY—DISCRETIONARY POWER OF CHANCELLOR.—In such case, it was within the discretion of the chancellor to dispose, at such future term, of the interest adjudicated to the infant complainants for a money consideration, if deemed for their best interests.

3. ID.—SALE OF MINORS' INTEREST IN REALTY—CONSENT—JUDICIAL DISCRETION—PRESUMPTION.—The mere statement on the face of a decree that there was consent, does not operate to show that it was based on that alone, but it will be presumed that there was a reasonable exercise of discretion, by the court, in directing a sale, intended for the benefit of the minors.—Bent v. Miranda, 78.

DEMURRER. See ABATEMENT, 1, 2; ATTACHMENT.

DISBARMENT PROCEEDINGS. See ATTORNEYS, 2.

EJECTMENT. See MINING CLAIM, 2.

ESTOPPEL. See MECHANICS' LIEN, 5; MORTGAGES, 4.

EVIDENCE. See ATTORNEYS, 2; CONTEMPT, 3; CORPORATIONS, 3; CRIMINAL LAW, 5, 8–10, 12, 20, 21, 24, 34, 35, 47, 48, 55, 63–66; MECHANICS' LIEN, 6, 9; MINING CLAIM, 2; PRACTICE, 7.

EXCEPTIONS. See PRACTICE, 6.

EXECUTION. See CRIMINAL LAW, 29.

EXEMPTIONS.

PARTNERSHIP—ASSETS OF INSOLVENT FIRM—CLAIM OF INDIVIDUAL PARTNERS.—Held: That the assets of an insolvent firm are a trust fund for the benefit of the creditors of the firm, and the individual partners are not entitled to the benefit of section 19, Laws 1887, exempting from levy and sale property of the value therein named, owned by the head of a family who is not the owner of a homestead, but only to claim such exemption out of the surplus, if any, remaining in the hands of the assignee after payment of the firm debts.—In re Spitz Bros. 622.

See, also, CORPORATIONS, 10.

FRAUD. See CORPORATIONS, 4.

GRANT OF PUBLIC LANDS. See CORPORATIONS, 10.

HABEAS CORPUS.

1. PRESENTATION OF FRAUDULENT CLAIM AGAINST AND CONSPIRACY TO DEFRAUD THE UNITED STATES—COURT OF PRIVATE LAND CLAIMS—JURISDICTION.—By section 14, Act, March 3, 1891, the court of private land claims was created, and given express authority to render judgment against the United States for the value of the lands which the United States may have granted or sold belonging to the claimant, which judgment, it provides, "when found shall be a charge on the treasury of the United States." By section 5438, Revised Statutes of United States, it is made unlawful for any person to present for payment or approval, to any person or officer in the civil * * * service of United States, any claim against the United States, knowing such to be false, fictitious, or fraudulent * * * or who enters into any conspiracy to defraud the United States, by obtaining the payment of any fraudulent claim, etc. On petition for a writ of habeas corpus for the release of the petitioner from commitment, after a preliminary hearing on the charges of presenting to the court of private land claims a fraudulent claim against and conspiring with another to defraud the United States,—Held: The judge of the court of private land claims is an officer in the civil service of the United States, within the meaning of the statute, and the presentation of such claim to that court, of which he is the presiding officer, was a presentation to "an officer in the civil service of the United States."—(U. S. v. Strobach, 48 Fed. Rep. 908.)

2. Where, as here, the committing court had jurisdiction of the offense charged, the proceedings upon which the prisoner was committed can not be collaterally attacked on habeas corpus.—In re Peraltareavis, 27.

3. ID.—APPEAL.—An appeal will not lie from the supreme court of this territory to the supreme court of the United States in habeas corpus cases. (Cross v. Burke, 146 U. S. 82; In re Lennon, 150 U. S. 393; In re Delgado, 140 U. S. 586, distinguished.)—In re Borrego et al. 655.

HOMICIDE. See CRIMINAL LAW, 23, 31, 55.

HUSBAND AND WIFE. See ASSUMPSIT, 2; PRACTICE, 7.

IMPEACHMENT OF RECORD. See CRIMINAL LAW, 4; JUDGMENT, 2.

IMPEACHMENT OF VERDICT. See CRIMINAL LAW, 11, 68.

IMPRISONMENT FOR DEBT. See CONTEMPT, 2.

INDICTMENT. See CRIMINAL LAW, 22, 26, 31, 32, 51, 52, 67.

INFERENCE. See TERRITORIAL LEGISLATION.

INSTRUCTIONS.

APPEAL—ASSIGNMENT OF ERRORS—REVIEW.—This court will not review alleged errors in instructions, whether given by the court below of its own motion, or demanded, unless an exception is saved by motion for new trial.—Rogers v. Richards, 658.

See, also, CRIMINAL LAW, 6, 7, 20, 21, 28, 33, 45, 55, 58–61, 65–67; WITNESS.

INTERVENTION.

1. SECS. 1890–1892, COMP. LAWS, 1884—EQUITY.—Sections 1890–1892, Compiled Laws, 1884, relate to actions at law, and not to equitable proceedings. In such proceedings parties claiming an interest in the subject-matter may come in by intervening petition and litigate their rights, if any they have; and it is within the inherent power of courts of chancery to permit them to do so.

2. RIGHT OF ACTION OF FOREIGN CORPORATION, NOT ADMITTED TO DO BUSINESS IN TERRITORY—COLLATERAL ATTACK.—An objection that a foreign corporation has failed to file a copy of its charter and of the laws of the state or territory granting the same, and to designate an agent on whom process may be served, as required by statute, before it is authorized to do business in this territory, can not be raised in a collateral proceeding by intervention, but only in a direct proceeding by quo warranto for that purpose.

3. TELEGRAPH COMPANY—RIGHT OF WAY ALONG LINE OF RAILROAD—EXCLUSIVE PRIVILEGE—CONTRACT AGAINST PUBLIC POLICY.—By section 5263, Revised Statutes of the United States, a railroad company is prohibited from entering into any contract granting an exclusive privilege over and along its right of way and through the public domain to any single telegraph company, where such railroad has acquired its right of way under and by virtue of an act of congress; and this act extends to all military and post roads, whether on the public domain, or on private property acquired by a railroad company by purchase or by condemnation proceedings; and a contract by a railroad company granting such privilege is against public policy, and void. (Trust Co. v. R. R., 63 Fed. Rep. 513; Tel. Co. v. Tel. Co., 96 U. S. 1.)—Trust Co. v. Cable Co. 327.

JUDGMENT.

1. VALIDITY.—Where the record showed that the court ruled the "defendant A., T. & S. F. R. R. Co., to plead," and when the plea was filed, it used, as the title of the case, "James H. Madden v. N. M. & S. P. R. R. Co.," and then followed the plea, "and defendant, the Atchison, Topeka and Santa Fe Railroad Company, by its attorney,

JUDGMENT. Continued.

* * *'' and issue was joined on this plea, trial had, and judgment entered, though the record was confused, it was sufficient to sustain the judgment.

2. ID.—IMPEACHMENT OF RECORD—CLERICAL OMISSIONS.—The record of a judgment can not be impeached by an ex parte affidavit; nor can mere clerical omissions by the clerk, as to the entry, defeat the judgment.

3. ID.—ORDER BY CONSENT—VALIDITY.—An order of court, made by consent of the parties, in a proceeding for the foreclosure of a mortgage and the appointment of receivers, requiring them to pay certain outstanding claims against the insolvent, is binding upon the parties until set aside by the court making the order.

4. ID.—FORMER DECISION ON IDENTICAL QUESTION—RES ADJUDICATA.—A decision of this court in a cause, on a former appeal, that the reversal of the judgment in the cause as to one of the defendants did not operate as a reversal as to the other, is res adjudicata as to the same question raised on a second appeal in the cause.—Trust Co. v. Madden, 159.

See, also, ASSUMPSIT, 3; CRIMINAL LAW, 14, 29; MECHANICS' LIEN, 8; MORTGAGES, 1.

JUDICIAL DISCRETION. See CRIMINAL LAW, 2, 13, 18, 19, 36–38; DECREE, INTERLOCUTORY, 2, 3.

JURISDICTION. See CREDITORS' BILL, 2; HABEAS CORPUS, 1, 2; PARTNERSHIP, 2; PRACTICE, 8; TITLE TO LAND.

JURORS. See CRIMINAL LAW, 3, 62, 68.

JURY, PETIT.

IMPANELING OF, WHEN EXHAUSTED BY CHALLENGES—CONSTRUCTION OF STATUTES.—Section 5 of the Act of February 18, 1887, in relation to the selection of jurors, applies only to vacancies in the regular panel and when a sufficient number of petit jurors can not be obtained from the regular panel for the trial of a particular cause, the panel must be completed by summoning bystanders or by an open venire addressed to the sheriff, as required by Compiled Laws, sections 634, 635, 638; the court can not direct the filling of the jury from a special list returned by the commissioners, by its direction, to be drawn from in such case.—Territory v. Carmody, 376.

JURY QUESTION. See CRIMINAL LAW, 48, 58.

JURY TRIAL. See MINING CLAIM, 2.

LARCENY. See CRIMINAL LAW, 6.

LICENSE, DRAMSHOP.

COMPENSATION OF COLLECTOR—CONSTRUCTION OF STATUTES.—Held: That the act of 1895, chapter 34, providing that the collector shall collect all taxes and licenses "remaining unpaid," and that might thereafter be "levied and assessed," and shall receive as compensation for his services four per cent of the amount collected, applies only to licenses which continue to be issued under the sections of Compiled Laws, 1884, yet operative on the nine remaining occupations, and not to liquor licenses, which can not "remain unpaid," under the act of 1891, unless issued in violation of law.—Sandoval v. Meyers, 636.

LIMITATION. See CLAIM AGAINST ESTATE; CORPORATIONS, 4; DECEDENTS' ESTATE, 1.

LOCATION NOTICE. See MINING CLAIM, 3.

MECHANICS' LIENS.

1. CONSTRUCTION OF STATUTES.—The mechanics' lien law, being remedial in its nature and equitable in its enforcement, should be liberally construed. This court held otherwise in Finane v. Hotel Co., etc., 3 N. M. 417; but the weight of authority is against that decision on this point, and it is overruled to that extent.

2. ID.—NOTICE OF LIEN, SUFFICIENCY OF.—Where the notice of lien and the bill of complaint follow the language of the statute, and are sustained by the proof, it is sufficient. (Minor v. Marshall, 6 N. M. 195.)

3. ID.—LIABILITY OF OWNER FOR LIEN ON LANDS APPURTENANT.—In an action by a contractor to foreclose a mechanics' lien upon a certain ditch and reservoir system, and certain lands appurtenant thereto, where it appeared his employer, by a contract with the owner, was to receive a portion of the proceeds of sale of such lands when sold at an increased value, after the construction of the ditch, and that the owner had full notice of the contract with plaintiff and that it was being executed by plaintiff as the original contractor, and it was not contended that the owner gave any notice that it would not be responsible for the work, as required by section 1529, Compiled Laws, 1884,—Held: That complainant was entitled to a lien on such land which was enhanced in value by the construction of the ditch.

4. ID.—OBJECTION TO NOTICE OF LIEN, TOO LATE, WHEN.—An objection to notice of lien for insufficiency in the statement of claim comes too late when made for the first time on appeal.

5. ID.—QUANTITY OF LAND—GOVERNMENT SURVEY—ADMISSIONS OF ANSWER—ESTOPPEL—PRESUMPTION.—In such action, where defendants admitted in their answer that the land in suit was appurtenant to the ditch and contained twenty-two thousand acres, and described the sections according to the government surveys, they were estopped to set up that the sections contained more than that number of acres. In the absence of any proof to sustain such contention, the court might presume that the discrepancy, if any, was accounted for by the deficiency in legal quantity by the statute and rules of government surveying. Moreover, in the description of land, the quantity must yield to the boundaries or number, where they do not agree.

6. ID.—CONTRACT—TENDER—CREDIT—EVIDENCE.—In such case, where complainant agreed to select a certain section of the land in suit and pay a certain sum for it, which was to go as a credit and payment on his contract on the final estimate, and his employers agreed to secure from the owner a deed to the same free of all incumbrances and deliver it to complainant, and there was some proof of the making of the deed by the owner, but not sufficient evidence to establish such tender, as was required by the terms of the contract, complainant was not bound to accept it and allow such credit.

7. ID.—FILING OF LIEN BY PRINCIPAL CONTRACTOR BEFORE SATISFACTION OF LIENS OF SUBCONTRACTORS.—Where it was contended that before the principal contractor could recover he should have satisfied the liens filed by the subcontractors, and it appeared he had not done so because appellant had not paid him according to contract,—Held: That the principal contractor was not bound to pay the subcontractors until he received his money for the work.

MECHANICS' LIENS. Continued.

8. ID.—FORECLOSURE—DEFICIENCY JUDGMENT—PLEADING.—In a proceeding for the foreclosure of a mechanics' lien, where the bill of complaint prayed for a deficiency judgment in case the property, when sold, should not produce sufficient to fully satisfy the amount found to be due complainant,—Held: That the prayer of the bill was proper and the court did not err in entering a deficiency judgment and order for writ of execution to issue in that event. (Dodge v. Trust Co., 106 U. S. 445.)

9. ID.—FINDING OF FACTS BY CHANCELLOR—WEIGHT OF EVIDENCE.—Where the finding of facts by the chancellor is clearly sustained by the weight of the evidence, it will not be disturbed on appeal.—Ford v. Land Ass'n, 37.

MINING CLAIM.

1. OWNERSHIP OF ADJOINING MINES IN COMMON—SUFFICIENCY OF CLAIM. When several adjoining mining claims are held in common, work done upon any one of them, in a given year, for the benefit of all, equal in amount to that required to be done upon all, is a sufficient compliance with the mining laws of the United States.

2. ID.—CLAIM OF PRIOR LOCATION — EJECTMENT — EVIDENCE—JURY TRIAL.—In ejectment for the recovery of three adjoining mines against persons claiming under a location made prior to a conveyance to plaintiff, where there was evidence of an oral agreement between plaintiff and two others that all mines located in the name of either should be owned by all in common, and three adjoining mines were located, one in the name of each, and an amount of work for the benefit of all was done on one mine, equal to that required by the mining laws to be done on all, and the interest of the others was conveyed to plaintiff, he was entitled to have the question of his ownership submitted to the jury.

3. ID.—OWNERSHIP OF ADJOINING MINES IN COMMON—LOCATION NOTICE, VALIDITY OF.—Where the names of three persons claiming to hold three adjoining mines in common did not appear on each location notice,—Held: That the legal title was in the locator named for each mine, and the others had such interest with him as constituted a holding in common, under the mining law, to the extent of making work done on one mine for the development of the three satisfy the law, when sufficient in quantity and value.—Eberle v. Carmichael, 169.

MINES AND MINING.

LOCATION—ORAL AGREEMENT—STATUTE OF FRAUDS.—Where each of three persons located a different mine, under a parol agreement that all mines located by either should be owned in common by them.—Held: That such agreement was not within the statute of frauds. Eberle v. Carmichael, 696.

MORTGAGES.

1. ASSIGNMENT OF PART OF DEBT—FORECLOSURE—BILL BY MORTGAGEE FOR ACCOUNTING—ADVANCEMENTS FOR EXPENSES—DEFICIENCY JUDGMENT.—Where a holder of bonds, secured by deed of trust on certain property, transferred the bonds to one who foreclosed the deed and became the purchaser of the property at the sale for less than the amount due on the bonds—on a bill for accounting, by the mort-

MORTGAGES. Continued.

gagee, who had made advancements to the mortgagor for taxes, etc., and taken its notes for the same, complainant was not entitled to have such notes decreed a prior lien on the property, and the transferee also held personally liable on the notes.

2. ID.—ADVANCEMENTS—PROOF—FINDING.—But held: That the court did not err in sustaining the finding of the master that the amount of said notes was advanced by complainant in the payment of taxes and for the protection of the property from damage and loss, which was amply supported by the proofs.

3. ID.—ADVANCEMENTS—PRIOR LIEN—FINDING.—Nor did the court err in sustaining the finding of the master that it was provided by the deed of trust that, for all moneys so advanced by complainant to defendant, the same should become a first lien upon the mortgaged property and paramount to the bonds described in the deed, where it provided that in case of a sale and foreclosure, after the payment of the costs of sale, all other expenses of the trust, including advancements for taxes and insurance, should be paid, then the principal and interest of the bonds.

4. ID.—BONDS SECURED BY DEED OF TRUST—PRIOR LIEN—NOTICE—ESTOPPEL.—The purchaser of bonds secured by deed of trust of record, securing also the payment of notes, is precluded from setting up want of notice that the notes, by the terms of the deed, are made a prior lien to the bonds.—Coon v. Cattle Co., 123.

MURDER. See CRIMINAL LAW, 14, 15, 20–22, 32, 44, 47, 57, 65.

NEWSPAPER PUBLICATION. See CONTEMPT, 4.

NEW TRIAL. See CRIMINAL LAW, 11–13, 68.

NONRESIDENCY. See ATTACHMENT.

NOTICE OF LIEN. See MECHANICS' LIEN, 2, 4.

PARDON. See CRIMINAL LAW, 53, 54.

PARTIES. See CORPORATIONS, 5.

PARTNERSHIP.

1. WHAT CONSTITUTES.—A contract whereby one leased to another a mill on the agreement of the other to conduct the business, hire and pay employees, keep the mill in repair, furnish accounts of receipts and expenditures, and to pay the lessor one half of the net receipts, the flour, etc., on hand at the termination of the lease to be the property of the lessor, who was to pay the lessee one half its value, was a partnership agreement.

2. ID.—DISSOLUTION—ACCOUNTING AND SETTLEMENT—ASSUMPSIT—JURISDICTION.—In an action of assumpsit on such contract to recover an amount alleged to be due by reason of partnership transactions, where the record disclosed that, though the firm was dissolved, the accounts and business of the firm remained unsettled at the time of the institution of the suit,—Held: That a court of chancery alone had jurisdiction to settle the accounts, and the district court erred in retaining and submitting the cause to the jury.—Willey v. Renner, 641.

See also, EXEMPTIONS.

PERJURY. See CRIMINAL LAW, 51, 52.

PLEADING. See ASSUMPSIT, 1, 2; CORPORATIONS, 5, 9, CREDITOR'S BILL, 1, 2; CRIMINAL LAW, 2, 22, 31, 32, 51; MECHANICS' LIEN, 8.

POSTMASTER.

1. SUIT ON OFFICIAL BOND—CLAIMS FOR CREDIT.—In a suit on the official bond of a postmaster for a breach of the bond on account of a shortage in his accounts, claims for credit were properly allowed, although, on the prior presentation thereof to the auditor of the treasury, no voucher had been presented, where the only possible voucher for money taken charge of by the postoffice inspectors was a receipt they had given the postmaster therefor, but afterward carried away, and where the voucher for money the postmaster had sent to the depository of the office was an acknowledgment of receipt and a certificate of deposit, required to be given, but not issued, by the depositary.

2. ID.—REMITTANCE OF POSTAL FUNDS TO DEPOSITARY BY REGISTERED PACKAGE—LIABILITY OF REMITTING POSTMASTER FOR LOSS.—In such action, a recovery could not be had against the postmaster for money, which in the discharge of his official duty, he had remitted by registered package to the depository of his office, though the package containing the money was stolen from the depository before being opened, and though the postal regulations provide that such postmaster shall not take credit, in his cash book or weekly statement, for money sent by him, until he has received the certificate of deposit. United States v. Swan, 401.

PRACTICE.

1. FAILURE TO SERVE DECLARATION—DISMISSAL OF ACTION.—On a motion to dismiss a cause, for the failure of plaintiff to serve defendant or his attorney with a copy of the declaration within ten days after his appearance, defendant is entitled to a judgment of dismissal, under section 4, Practice Act, 1891, although the declaration be served before the judgment is rendered, where, before such service, the motion to dismiss has been heard and submitted, without any showing by plaintiff for his failure to serve the declaration within the prescribed time.—Insurance Co. v. Etheridge, 18.

2. ID.—CERTIORARI—BOND—APPEAL.—Where, upon application, by plaintiff, to the judge of the district court for a writ of certiorari from the judgment of a justice of the peace, under section 2442, Compiled Laws, 1884, requiring the justice to send up a transcript of the record in the cause, in the manner prescribed by said section, and the judge granted the writ, and required plaintiff to file bond within seven days thereafter, in double the amount of the judgment, to be approved by the clerk of said court, which was done, the granting or refusing of the writ, the amount of the bond, and the time within which it should be filed, were matters resting in the sound discretion of the judge, not reviewable on appeal, where there has been no abuse of such discretion.

3. ID.—OMISSION OF FIRST FULL NAME OF PLAINTIFF—MOTION TO DISMISS.—In such case, a contention that the writ of certiorari should have been dismissed, because the account sued on did not contain the first full name of the plaintiff, raised for the first time in the district court, by motion, instead of by plea, as required by the rules of pleading and practice for the procedure of causes in said court, is not tenable, and will not be sustained.

PRACTICE. Continued.

4. ID.—DEFECTIVE BOND—MOTION TO DISMISS.—Though the bond filed in such action was not in exact conformity to the statute, yet was in substantial compliance therewith, was taken and accepted by the clerk of the district court, and there was no motion for a new bond, and defendant was not prejudiced thereby, judgment having been rendered against him in that court, it was sufficient, and the court properly refused to dismiss the writ of certiorari on that ground.

5. ID.—LAWS, 1889, CHAP. 48—COMP. LAWS, 1884, SEC. 2442.—Chapter 48, Laws, 1889, providing a distinct remedy where a justice of the peace wrongfully refuses to grant an appeal in any case allowed by law, is neither in conflict with, nor an amendment or repeal of, section 2442, Compiled Laws, providing for a writ of certiorari where judgment is rendered by a justice of the peace, and a party is prevented or unable, from any cause, to appeal therefrom within ten days.—Lockhart v. Woolacott, 21.

6. ID.—APPELLATE—EXCEPTIONS MUST BE TAKEN, WHEN.—The appellate court will not consider errors committed in the trial of causes at law, not excepted to in the trial court at the time the ruling was made.

7. REPLEVIN—HUSBAND AND WIFE—COMMUNITY PROPERTY—EVIDENCE. In an action of replevin by the wife for the recovery of certain goats levied on by execution on a judgment against the husband, where plaintiff's evidence showed that the property was identified, that it was purchased by the husband as the agent of the wife, and that the balance of the purchase money was secured by mortgage on other property belonging to her, an objection that there was nothing in the evidence to show that the property was not community property, and that the presumption was that all acquisitions during the marriage were such property, was without merit.

8. REPLEVIN—FAILURE TO GIVE BOND PRIOR TO ISSUANCE OF WRIT—PLEA TO MERITS—JURISDICTION.—Nor was there any merit in the contention that such action should be dismissed for failure to give a replevin bond prior to the issuance of the writ, as being jurisdictional, where there was an appearance and pleading to the merits. Such objection should have been taken advantage of by proper motion before the pleading to the merits.—Laird v. Upton, 409.

PREJUDICAL ERROR. See CRIMINAL LAW, 28.

PRESUMPTION. See CRIMINAL LAW, 1, 60; MECHANICS' LIEN, 5.

REASONABLE DOUBT. See CRIMINAL, 23, 33.

REPLEVIN.

JUSTICE'S COURT—APPEAL, DISMISSAL OF.—The plaintiff in an action of replevin, brought before a justice of the peace, can not, on appeal to the district court, by a dismissal of his appeal, deprive the defendant of his right to a trial as to the value of the property replevied and an assessment of damages for its detention; and it would have been error for the court to have granted such application against defendant's objection.—Strauss v. Smith, 391.

See, also, CONDITIONAL SALE OF PERSONAL PROPERTY, 1; PRACTICE, 7, 8.

RES ADJUDICATA. See JUDGMENT, 4.

SEISIN. See TITLE TO LAND, 1.

SELLING LIQUOR TO INDIANS. See CRIMINAL LAW, 11.

STATUTE OF FRAUDS. See MINES AND MINING.

STOCK SUBSCRIPTIONS. See CORPORATIONS, 1, 2, 6.

TAXATION. See CORPORATIONS, 10.

TENDER. See CONDITIONAL SALE OF PERSONAL PROPERTY, 2; MECHANICS' LIEN, 6.

TERRITORIAL LEGISLATION.

1. VALIDITY—CONSTRUCTION OF STATUTES.—It was not the intention of congress, by the act of June 19, 1878, making appropriation for the compensation of territorial officers and members and officers of territorial legislatures, and providing that "no greater number of officers or charge per diem shall be paid or allowed by the United States to any territory," to prohibit the territorial legislatures from employing others subordinate to those named in the act and providing for their payment out of the territorial treasuries, or to restrict them in the exercise of their discretion as to their necessities, but to limit the officers, to be paid out of the United States treasury, to those enumerated in the act. (Braithwaite v. Cameron, 38 Pac. Rep. 1084.)

2. ID.—ACQUIESCENCE BY CONGRESS—INFERENCE.—The territorial legislature having assumed and exercised for a series of years the right to engage additional subordinates, and congress having continuously acquiesced in its exercise, the approval of that body may be reasonably inferred. (Cooley's Const. Lim. 34, note.)

3. ID.—VALIDITY—CONSTRUCTION.—It is the duty of the courts to sustain legislative action, unless clearly satisfied of its invalidity.—Baca v. Perez, 187.

TITLE TO LAND.

1. SUIT TO QUIET—POSSESSION—SEIZIN.—The possession of one entering upon land under a deed is coextensive with the land described in the deed; and where two persons are in actual possession of different parts of a tract of land, holding under adverse deeds, covering also land in dispute between them, the seizin of the land not in the actual occupancy of the adverse party is in him who has the better title. (3 Wash. Real Prop. 138; Clark v. Courtney, 5 Pet. 354.)

2. ID.—EQUITY JURISDICTION.—In a suit to quiet title to land, where the constructive possession under the deed and the actual possession of part of the land showed the pedis possessio to be in complainant, and, moreover, neither party was in the actual or constructive possession, and there was no tenant to the praecipe against whom ejectment could be brought, equity alone could give relief.—Gentile v. Crossan, 347.

See, also, as to TITLE, CONDITIONAL SALE OF PERSONAL PROPERTY, 1; CREDITOR'S BILL, 2.

TRIAL BY JURY. See CRIMINAL LAW, 16.

UNPROFESSIONAL CONDUCT. See ATTORNEYS, 1, 2.

VARIANCE. See CRIMINAL LAW, 26.

VENUE. See CRIMINAL LAW, 2, 18, 25.

WITNESSES.

VERDICT. See ASSUMPSIT, 3, 4; CRIMINAL LAW, 5.

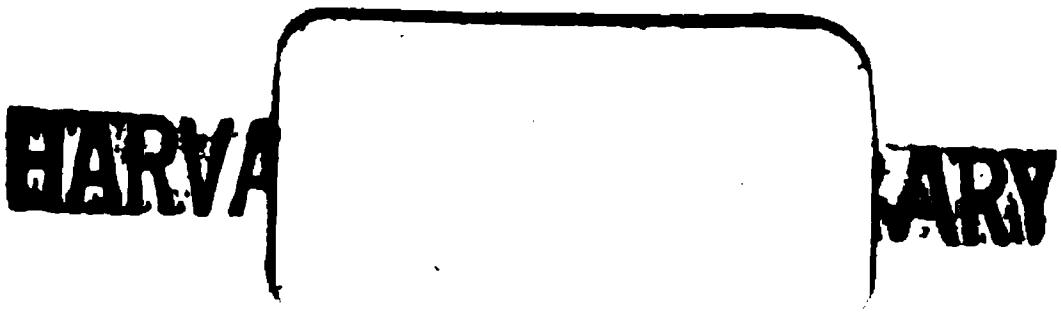
WAIVER. See ASSUMPSIT, 1; CRIMINAL LAW, 17.

WITNESS.

INSTRUCTION AS TO CREDIBILITY.—An instruction that, if the ju any witness had testified falsely as to any material matte they had the right to disregard all the testimony of suc unless such testimony was corroborated by other credible was misleading and erroneous, in omitting the essential e the witness had knowingly and willfully sworn falsely.—I Co. v. Skillicorn, 8.

See, also, CRIMINAL LAW, 35, 49, 50, 53.

Ex. J. M.


HARVA
ARY